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Supreme Court, U. S.
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IN THE

Supreme Court of The United States

October Term, 1972

No. 72-1091

HONORABLE FRANK J. BATTISTI,
Chief Judge, United States
District Court for the Northern
District of Ohio,
Petitioner,

and

GEORGE S. HEITZLER, JR.,
Intervenor below,
Petitioner,

vs.

C. WILLIAM O'NEILL, Chief Justice,
LOUIS J. SCHNEIDER, JR., Associate Justice,
J. J. P. CORRIGAN, Associate Justice,
LLOYD O. BROWN, Associate Justice,
THOMAS M. HERBERT, Associate Justice,
LEONARD J. STERN, Associate Justice,
ROBERT E. LEACH, Associate Justice,
all members of the bench of the
Supreme Court of Ohio
State House Annex
Columbus, Ohio 43215
Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STANLEY E. PREISER
PREISER & WILSON
Post Office Box 2506
Charleston, West Virginia 25329
Telephone 304/344-9651
Counsel for George S. Heitzler, Jr.,
Intervenor below and real party in
interest, Petitioner.

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HONORABLE C. WILLIAM O'NEILL,
Chief Justice of Ohio, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR

THE SIXTH CIRCUIT

Petitioner, George S. Heitzler, Jr., intervenor below and real party in interest, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 10, 1972.

OPINION BELOW

The *Per Curiam* opinion and order of the United States Court of Appeals for the Sixth Circuit, as yet unreported, is set out in the appendix at pp. A-43 to A-47.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was rendered on November 10, 1972. A prompt Motion to Stay the Execution and the Enforcement of Writ of Mandamus and Order Pending the Filing of a Petition for Writ of Certiorari was filed on November 13, 1972 and by Order entered the same day, said Motion was denied. (Appendix, pp. A-49. This Petition is filed within ninety (90) days of the date of entry of the judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1), and S.Ct. Rules 19-27, among others.

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Sixth Circuit so fundamentally misapply the "Abstention Doctrine" so as to divest the Federal District Court below of its lawful and proper jurisdiction already assumed in a federal civil rights suit seeking federal relief from state bar association disciplinary proceedings against a state judge when such disciplinary proceedings were allegedly being conducted in flagrant violation of those constitutional and civil rights protected by 42 U.S.C. §1983 and 28 U.S.C. §1343 (3) and (4).

2. Was the venue for the federal civil rights action based upon 28 U.S.C. §1392(a) proper in a case where the individual justices of the Ohio Supreme Court are

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named as defendants, and where two of the individual justices of the Ohio Supreme Court reside in the Northern District of Ohio, and the balance of them reside in the Southern District of Ohio, where the main office of the Supreme Court of Ohio is situated in Columbus, Ohio, in the Southern District, and where by statute the Ohio Supreme Court is authorized to sit and act anywhere in the State of Ohio, and where the suit is brought in the United States District Court for the Northern District of Ohio.

STATUTORY PROVISIONS RELIED UPON

42 U.S.C. §1983 Civil action for deprivation of rights:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

28 U.S.C. §1343(3) and (4) Civil rights and elective franchise:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> "(1) ***
>
> "(2) ***
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege

or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

28 U.S.C. §1392(a) Defendants or property in different districts in same State:

"(a) Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts."

Title 25, Ohio Revised Code §2503.34 Special and Adjourned Terms:

"The supreme court may hold special or adjourned terms at such times and places as a majority of the judges determines. If a special term is held elsewhere than at Columbus, thirty days' notice of the time and place thereof must be given by publication in the newspapers printed in Columbus. The court may make necessary orders for the return of process and the transmission of papers and files of the court to and from the place of holding a special term."

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STATEMENT OF THE CASE

A. Proceedings in the State Court.

Case No. 168

On August 11, 1971 three members of the Cincinnati Bar Association filed a Complaint with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio reciting certain alleged acts on the part of George S. Heitzler, Jr., Judge of the Court of Common Pleas (Division of Domestic Relations) of Cincinnati, Ohio, which allegedly constituted grounds for misconduct as a judge assigning alleged violations of certain Canons of Judicial Ethics. Judge Heitzler timely filed an Answer denying the charges.

Then on October 4, 1971, two additional charges were leveled against Judge Heitzler in a Supplemental Complaint filed by the same three members of the Cincinnati Bar Association. By Supplemental Answer Judge Heitzler denied these additional charges.

The Complaint and Answer and the Supplemental Complaint and Supplemental Answer designated as Case No. 168 came on for hearing before three members of the Board of Commissioners on Grievances and Discipline designated as the Hearing Panel. The hearings lasted approximately six days during which time testimony was taken and transcribed.

Then the Hearing Panel, without notice to the Petitioner, filed their findings of fact and recommendations with the Board of Commissioners on Grievances and Discipline on August 4, 1972, thereby depriving Peti-

tioner of his right to file a brief on the merits concerning the charges filed against him in Case No. 168. The Board of Commissioners filed its findings of fact and recommendations with the Secretary of the Board on September 1, 1972, also without notice to Petitioner. On the evening of September 1, 1972, Petitioner and his counsel read about the conduct of the Hearing Panel and the Board in the newspapers; no formal notice was received by Petitioner from the Board or the Secretary of the Board until September 5, 1972. After repeated requests by counsel for Petitioner, and Petitioner himself, Judge Heitzler was finally able to obtain a copy of the findings of fact and recommendations of the Hearing Panel on September 20, 1972, approximately forty five days after they had been filed with the Board and approximately nineteen days after the Board of Commissioners had already acted. Inasmuch as Petitioner was not given the right to be heard, and was not given the right to file a brief on the merits of the charges against him, then this conduct constituted a clear violation of procedural due process.

On August 4, 1972 at the meeting held to consider Judge Heitzler's case, only a two and one half hour meeting was held and other matters than Petitioner's were presented. Only fifteen of the seventeen members of the Board attended. As well, one member of the Board, although present, allegedly did not vote, nor discuss the proceedings in this case. This Board member, Gordon Scherer, had testified against Petitioner in the disciplinary hearings in this case, had played a key role in launching the grand jury proceedings against Petitioner seeking to have him indicted, and was also critical of the prosecuting attorney when the grand jury failed to indict Petitioner. The very pres-

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ence of a person of such obvious bias and intense dislike for the Petitioner raises grave constitutional questions concerning the impartiality of the Board proceedings.

Furthermore, three members of that same Board who sat in judgment in Case No. 168, had also heard evidence in Case No. 172, a companion case involving Petitioner, but based on different charges. (Case No. 172 was later dismissed, after Petitioner was indefiinitely suspended from the practice of law.) Further, the charges in Case No. 172 grew out of and were a direct result of the Board's investigation in Case No. 168. As such, the Board of Commissioners was improperly influenced and prejudicially and unconstitutionally constituted. As well, Petitioner submits that no member of the Board, let alone seventeen members of the Board there present could have read the 1408 page transcript during the 2½ hour meeting. As such, the Board abrogated its duties and responsibilities and unconstitutionally and unlawfully delegated their authority to the Hearing Panel.

Finally, the procedure regarding the factual findings and recommendations adopted in the instant case was likewise violative of due process because the ultimate decision rendered by the Ohio Supreme Court was based on double and sometimes triple hearsay. The three-man Hearing Panel alone takes the testimony which may include hearsay. The Panel in turn renders its findings to a Board who makes a hearsay report to the Ohio Supreme Court—a process which is an integral part of the statutory scheme for the disciplining of attorneys in the State of Ohio, which it itself unconstitutional.

On September 1, 1972, the Supreme Court of Ohio entered an Order directing Judge Heitzler to show cause why the recommendations of the Board of Commissioners should not be confirmed and a disciplinary Order entered. Then on September 7, 1972 the Supreme Court of Ohio rendered a *Per Curiam* opinion and on the next day entered on Order without hearing or notice suspending Judge Heitzler from exercising any further judicial duties until the Supreme Court of Ohio rendered its decision and judgment in the matter. A retired Judge was temporarily appointed to fill the vacancy.

On September 18, 1972, Judge Heitzler, *pro se*, filed a Motion to Reconsider and for a hearing concerning his removal as Judge. The motion was not granted.

On October 17, 1972, newly obtained counsel for Judge Heitzler filed a Motion to Quash and Dismiss the Findings of Fact of the Board of Commissioners and to Dismiss and Recuse each Board member. On October 20, 1972, Judge Heitzler filed his formal objections to the Findings of Fact and Recommendations with the Supreme Court of Ohio.

Case No. 172

On February 17, 1972, the same three members of the Cincinnati Bar Association who had previously filed charges against Judge Heitzler in Case No. 168, filed a new set of charges with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. Judge Heitzler filed a timely answer denying the charges leveled against him and challenged the jurisdictional basis of the charges, pleaded double jeopardy and pleaded estoppel.

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A Motion to Dismiss filed by Judge Heitzler was denied and the Complaint and Answer came on for hearing before a Hearing Panel on May 31, 1972. Testimony was taken and transcribed.

The Cincinnati Bar Association filed its Brief on the merits of the alleged charges against Judge Heitzler and the Brief on behalf of Judge Heitzler was due within a very short time thereafter.

The above factual recital constituted the posture of the state court proceedings in both Case No. 168 and Case No. 172 just prior to the institution of the federal civil rights claim detailed below.

B. Proceedings in the Federal Courts.

On October 24, 1972, Judge Heitzler filed a verified Complaint with the United States District Court for the Northern District of Ohio invoking jurisdiction under the Civil Rights Act embodied in 28 U.S.C. §1343 (3) and (4) for numerous flagrant violations under color of state authority of those civil rights protected by 42 U.S.C. §1983 (Appendix pp. A-1 to A-29). Named as parties defendant in those proceedings were all the individual justices of the Ohio Supreme Court. Also filed was a Motion for a Temporary Restraining Order, a Preliminary and Permanent Injunction. (Appendix pp. A-31 to A-35).

On October 25, 1972, the Temporary Restraining Order was granted *ex parte* which restrained the individual justices of the Supreme Court of Ohio and all persons acting in concert with them from proceeding further in either Case No. 168 or Case No. 172. (Appendix, pp. A-37 to A-39). The hearing on the

Motion for a Preliminary Injunction was set for November 2, 1972.

On October 27, 1972, counsel for the individual justices of the Supreme Court of Ohio filed a Petition for a Writ of Mandamus and/or Prohibition with the United States Court of Appeals, or a single Judge thereof, praying that the temporary restraining Order be vacated and that the District Judge be directed to refrain from taking any further action in the case then pending in the District Court. Counsel also prayed that a stay be granted pending action on the Petition for Writ of Mandamus and/or Prohibition.

The same day, October 27, 1972, one Judge of the United States Court of Appeals, Judge John W. Peck, *ex parte* granted a stay of all further proceedings in the United States District Court and set the hearing for the Petition for Writ of Mandamus and/or Prohibition on November 16, 1972. (Appendix, pp A-41-42). Judge Peck apparently felt that the issues raised in the State proceedings were identical with those raised in the Federal proceedings and therefore, this case was a proper one for the application of the doctrine of abstention.

Notably, the oral argument in the Supreme Court of Ohio was scheduled for November 15, 1972, and the oral argument on the Petition for Writ of Prohibition and/or Mandamus was scheduled for November 16, 1972.

On November 1, 1972, Judge Heitzler filed a Motion to Intervene in the proceedings before the Sixth Circuit Court of Appeals, which Motion was later granted. He also filed a Motion and Brief in support thereof to

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dissolve, vacate, dismiss, or modify the Stay Order previously entered by Judge Peck and additionally moved for an oral hearing on that motion.

The Sixth Circuit Court of Appeals, by *per curiam* opinion filed November 10, 1972, six days prior to the hearing originally scheduled, without the benefit of notice or oral argument, or brief directed to the propriety, or lack of it, concerning the Petition for Mandamus and/or Prohibition, granted the Mandamus as prayer for and directed the United States District Court to vacate and withdraw the temporary restraining order and to dismiss the action for lack of venue. (Appendix, pp. A-43 to A-47).

A prompt motion to stay the enforcement of the Writ of Mandamus was denied by the Sixth Circuit Court of Appeals on November 13, 1972. Application for a stay of execution pending the filing of a Petition for a Writ of Certiorari was next made to Justice Potter Stewart who in turn referred Judge Heitzler's application for a stay to Justice Byron R. White. By notation dated November 14, 1972, the motion to stay, pending the filing of a Petition for Writ of Certiorari, was denied. The way was thus clear for oral argument in the Supreme Court of Ohio as to the merits of the charges embodied in Case No. 168. Oral argument was then held in the Supreme Court of Ohio and on December 15, 1972, Judge Heitzler was indefinitely suspended from the practice of law.

It is the *per curiam* opinion rendered by the Sixth Circuit Court of Appeals filed on November 10, 1972, granting the Writ of Mandamus, thereby divesting the Federal Court of its lawful jurisdiction and clear-

ing the way for the Supreme Court of Ohio to rule on the merits of Case No. 168, that necessitates this Petition for Writ of Certiorari.

This case raises grave questions of federal law and substantial constitutional rights which Petitioner submits have been decided contrary to settled decisions of this Honorable Court. As well, this case assumes nationwide importance because of the uncertainties inherent in those bar disciplinary proceedings based on oblique standards of due process. Also of great significance is the fact that the Sixth Circuit Court of Appeals by its immediate action prevented the District Court from even taking evidence concerning the allegations that numerous federal civil rights of Petitioner had been violated and thereby ordered the District Court to divest itself of its lawful jurisdiction already assumed.

This case presents an excellent opportunity to revaluate the status of lawyers as "first class citizens" *Spevack* v. *Klein*, 385 U.S. 511 (1967) when they are subjected to grievous violations of procedural due process in quasi criminal proceedings, *In Re Ruffalo*, 390 U.S. 544 (1968) and seek federal injunctive relief via the Civil Rights statute, 42 U.S.C. §1983 in light of the recent decisions of this Honorable Court in *Younger* v. *Harris*, 401 U.S. 37 (1971) and especially in light of the most recent civil rights decision of *Mitchum* v. *Foster*, 407 U.S. 225 (1972). Finally, this case presents a perfect situation for this Honorable Court to speak definitively concerning the construction of 28 U.S.C. §1392(a) concerning venue involving defendants in different districts.

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I.

The United States Court of Appeals for the Sixth Circuit So Fundamentally Misapplied the Abstention Doctrine As to Divest the Federal District Court Below of Its Lawful and Proper Jurisdiction Already Assumed in a Federal Civil Rights Suit Seeking Federal Relief from State Bar Association Disciplinary Proceedings Against a State Judge When Such Disciplinary Proceedings Were Allegedly Being Conducted in Flagrant Violation of Those Constitutional and Civil Rights Protected by 42 U. S. C. §1983 and 28 U. S. C. §1343 (3) and (4).

The precise issue here presented is whether the United States Court of Appeals for the Sixth Circuit was correct when it held,:

> ". . . that the issuance of a temporary restraining order by the District Judge under the facts of this case was improvident, and that the District Court should have abstained from interfering with the pending proceedings in the Supreme Court of Ohio." (*Per Curiam* Opinion of the Sixth Circuit, Appendix, pp. A-43 to A-47).

Petitioner submits that the "Abstention Doctrine" has no applicability in a case such as this one where compelling legal and factual reasons mandate federal intervention despite pending state proceedings.

Of paramount importance is the fact that the Court of Appeals for the Sixth Circuit is an unprecedented action, ordered a Federal District Judge to disclaim jurisdiction which it clearly had and ordered that Federal District Judge to abstain in a case, without even giving the District Judge the opportunity to hear or decide in the first instance whether he should abstain.

It must be noted that the Court of Appeals placed great reliance upon the decision of this Honorable Court in *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970). Petitioner will readily concede that the *Atlantic Coast Line* case, a labor relations case concerning injunctive relief from certain picketing, correctly stated that:

> "Any doubts as to the propriety of a federal injunction against state proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." 398 U.S. 281, 297.

Conversely, the Respondents herein must concede that unlike the *Atlantic* case, the jurisdictional rationale of the instant case is one for the deprivation of numerous civil rights under color of state authority—an issue jurisdictionally and fundamentally quite different than a labor relations problem as was presented in *Atlantic, supra.*

Furthermore, Respondents must likewise concede that the decision in *Atlantic, supra*, turned on whether or not the federal injunction over the state court injunction against picketing fell within one or more of the three explicit statutory exceptions to the Anti Injunction Act (28 U.S.C. §2283). Ultimately Justice Black held that the federal injunction over the state court proceedings in the *Atlantic* case was not "to protect or effectuate" the District Court's judgment nor was it "necessary in aid of" the District Court's jurisdiction. 398 U.S. at 284-285. The third exception to the Anti Injunction Act, viz. where the injunctive relief is "expressly authorized by Act of Congress" was not even raised. 398 U.S. at 282-283, and 288.

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However, this Honorable Court has unanimously held in the very recent decision of *Mitchum* v. *Foster*, 407 U.S. 225 (1972) that the provisions of 42 U.S.C. §1983 do in fact constitute an "expressly authorized" exception to the Anti Injunction Act and in such civil rights cases then injunctive relief over state court proceedings is not barred by 28 U.S.C. §2283. Thus, what little vitality the *Atlantic* case once had as precedent has been entirely supplanted by the wisdom of the *Mitchum* decision in civil rights litigation such as the instant case.

Therefore, the issue in the case at bar now deals squarely with the applicability, or lack of it, of the "Abstention Doctrine" *per se* in a federal civil rights case brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343 (3) and (4), seeking relief from state bar association disciplinary proceedings against a judge.

Uniquely in point is the language of the Second Circuit Court of Appeals in the opinion of *Wright* v. *McMann*, 387 F.2d 519 (2nd Cir. 1967) wherein Judge Kaufman noted *the very limited use* of the "Abstention Doctrine" in Civil rights cases. He stated:

> "While the doctrine has not been entirely abnegated and instances may still arise in which it will be appropriate, see Harrison v. NAACP, 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed.2d 1152 (1959); Railroad Comm'n v. Pullman Co. [312 U.S. 496], *it is reasonable to conclude that cases involving vital questions of civil rights are the least likely candidates for abstention*, e.g., McNeese v. Board of Education, [373 U.S. 668] at 673-674, 83 S.Ct. 1433. See note, Federal-Question Abstention [80 Harv. L. Rev. 604] at 607-

> 608. And in the instant case 'the federal right [is not] in any way entangled in a skein of state law that must be untangled before the federal case can proceed'. McNeese v. Board of Education, supra, 373 U.S. at 674, 83 S.Ct. at 1437. *Indeed the objectives of the Civil Rights Act would be defeated if we decided that this federal claim grounded on an alleged violation of the federal constitution would have to stagnate in the federal court until some nebulous or non-existent remedy was pursued like a will-o'-the-wisp in the state court.* See England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964)." (Emphasis supplied.)

Additional persuasive authority of this Honorable Court has established the inapplicability of the "Abstention Doctrine" in most civil rights cases. See *Zwickler* v. *Koota*, 389 U.S. 241, 248-251, (1967); *Bailey* v. *Patterson*, 369 U.S. 31 (1962); and *Holmes* v. *N. Y. City Housing Authority*, 398 F.2d 262, 266 (2nd Cir. 1968) and the rejection of this doctrine has been carried into proceedings involving the legal profession. See *Devita* v. *Sills*, 422 F.2d 1172 (3rd Cir. 1970); *Lipman* v. *VanZant*, 329 F. Supp. 391 (D. C. Miss. 1971); *Law Student's Civil Rights Research Council Inc.* v. *Wadmond*, 299 F. Supp. 117 (D. C. N. Y. 1969) aff'd 401 U.S. 154; *Keenan* v. *Board of Law Examiners*, 317 F. Supp. 1350 (D. C. N. C. 1970).

Indeed, when the federal district court first assumed jurisdiction in the instant case and issued the temporary restraining order against the Ohio Supreme Court justices and all persons acting in concert with them, the district court was following the established law of the Sixth Circuit itself. *Taylor* v. *Kentucky Bar Association*, 424 F.2d 478 (6th Cir. 1970).

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Furthermore, the federal district court had to assume jurisdiction over plaintiff's federal civil rights claim *prior to a final adjudication on the merits of the disciplinary charges* against the plaintiff by the Ohio Supreme Court; otherwise the district court might have been forever deprived of its lawful jurisdiction, the plaintiff would be deprived of a federal forum within which he could assert his federal cause of action, and the only appeal would then be by Writ of Certiorari directly to this Honorable Court. Compare *Taylor* v. *Kentucky Bar Association, supra,* (permitting federal jurisdiction *prior* to a final adjudication on the merits of state disciplinary proceedings) with *Coogan* v. *Cincinnati Bar Association,* 431 F.2d 1209 (6th Cir. 1970) (affirming a dismissal of a federal civil rights suit brought *after* the Ohio Supreme Court rendered a decision on the merits of the disciplinary charges brought against Coogan); *McKay* v. *Nesbitt,* 285 F. Supp. 498, aff'd 412 F.2d 846 (9th Cir. 1969) cert. denied 396 U.S. 960, 397 U.S. 1004 (similar to *Coogan*).

The *Talyor* decision, *supra,* is crucial for numerous reasons. First the chronology of events in *Taylor* is virtually identical to those in the instant case, and second, the *Taylor* decision and the subsequent opinion rendered by the district court *after remand* dispels in advance the argument likely to be advanced that the federal court is engaged in an unwarranted interference with state proceedings.

Turning first to the chronology of *Taylor,* we discover that the bar association filed a complaint praying that Taylor be disbarred. An answer was filed on Taylor's behalf and a three man Trial Committee was con-

vened to conduct hearings into the grievances enumerated in the charges. 424 F.2d 478, 480.

The Court of Appeals for the Sixth Circuit then mistakenly stated at 424 F.2d 478, 480:

> "Since that initial hearing, continuances, postponements, and the initiation of this lawsuit have forestalled further action by the Trial Committee."

In reality, the Trial Committee had already found Taylor guilty as charged, had filed its report with the Board of Governors, and had recommended a one year suspension from practice. Further, the Board of Governors had already acted upon the report made to it and in turn had already reported to the Kentucky Supreme Court who had not yet acted upon the recommendation. (See the Memorandum decision and Order of the United States District Court for the Western District of Kentucky after remand by the Sixth Circuit. Appendix pp. A-49 to A-68). Hence, in point in time, the instant case is indistinguishable from the *Taylor* decision in terms of chronology. Suit by Petitioner Heitzler in federal district court was filed *prior* to a final decision on the merits of the charges against him by the Ohio Supreme Court.

Second, considering the federal-state relations issue it is instructive to note that the federal court in *Taylor* on remand reviewed in extensive detail only those allegations Taylor embodied in his federal civil rights complaint to ascertain what, if any, civil rights were infrnged by the state disciplinary proceedings. Having concluded that Taylor's civil rights were *not infringed*, the district court added at p. 16 of the Opinion on remand that:

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> "Again we hasten to add that *the Kentucky Court of Appeals is the final arbiter in these disciplinary proceedings;* they will make the final decision on the fairness of the recommended 5 year suspension. We can detect no unequal treatment, bias or bad faith in that recommendation." (Emphasis supplied.)

Thus the Bar Association was relieved from the prohibition of proceeding to discipline Daniel T. Taylor, and the federal court recognized the ultimate supremacy of the highest State tribunal to regulate its own bar subject to the narrow right of inquiry *prior* to a final adjudication on the merits to ascertain if civil rights have been infringed by such disciplinary proceedings. Exactly the same situation is presented in the instant case.

The ready recognition by the federal court in *Taylor* of the supremacy of the highest state court to regulate and discipline the bar association membership as needed, dispels in advance the need for any type of *Burford* abstention [*Burford* v. *Sun Oil Company*, 319 U.S. 315 (1943)].

First, in *Taylor* the ultimate supremacy of the state's highest court was expressly recognized. Second, the *Burford* decision dealt with a complex scheme of regulation of oil proration in Texas oil fields—a specialized property matter entirely of local concern. In the case at bar we are instead presented with a simple scheme for the regulation of the legal profession which is judicial, not proprietary in nature and certainly not complex in the "*Burford*" sense. Hence, the judicial regulation of the membership of the bar can hardly be equated with the proprietary interpretation of oil proration orders. Third, and of premier significance, Peti-

tioner does not seek, nor would he urge that federal courts act as overseers of disciplinary procedures conducted by the highest state court. Rather, Petitioner asserts his right to a narrow group of constitutional rights based upon an overriding federal policy clearly embodied in the civil rights act (42 U.S.C. §1983) and only in the limited extent that the state regulatory procedures should comport with basic standards of due process. See *Holmes* v. *N. Y. City Housing Authority*, 398 F.2d 262, 266 (2nd Cir. 1968). Fourth, this Honorable Court has quite properly entered the affairs of the states when sound reasons dictated intervention, as in education, *McNeese* v. *Board of Education*, 373 U.S. 668 (1964) and in the domain of state employees, *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967). Certainly if the compelling facts are present, as they are in the instant case, no sound reason exists for ignoring the overriding federal policy embodied in the civil rights statute. Federal intervention is thus wholly justified. Even the most cursory reading of the complaint (Appendix, pp. A-1 to A-29) indicates that "special circumstances" are present in the instant case which mandate federal intervention. See *Younger* v. *Harris*, 401 U.S. 37 (1971).

Taking as true the uncontroverted allegations of the complaint one finds that the disciplinary proceedings conducted against Petitioner (in both Case No. 168 and later Case No. 172—a companion case) were conducted without a semblance of due process and in such a flagrantly unconstitutional manner so as to constitute bad faith and harrasment leading to immediate and irreparable harm. To say that the harm Petitioner suffered was great is to minimize the indignity suffered

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when a judge of a court is removed from office without hearing and notice.

First, Petitioner was denied the right to file a brief on the merits of the charges against him with the three man Hearing Panel. Then without notice, the Panel filed their findings with the seventeen man Board of Commissioners on Grievances and Discipline. Also without notice the Board filed its findings with the Secretary of the Board of Commissioners. Only after Petitioner read about the above action in the newspapers and only after repeated requests were made, was Petitioner even able to obtain a copy of the Panel's findings and recommendations concerning the charges against him and then fully forty-five days after they had been filed. Petitioner had no opportunity to brief or so much as argue the merits of the charges against him prior to the final recommendations.

Then when the seventeen man Board of Commissioners did meet for their two and one half hour meeting which culminated in the recommendation that Petitioner be indefinitely suspended from the practice of law only fifteen men were present. Two were absent and one member who had testified against Petitioner in the disciplinary proceedings was present, although he allegedly did not discuss the issues nor vote even though this same member had previously given testimony against Petitioner before an Ohio Grand Jury, who did *not* return an indictment against Petitioner. Said member also was characterized by the press as one who had played a "key role" in those Grand Jury proceedings and who was "very critical" of the failure to indict Petitioner.

Notwithstanding the above partiality of the Board itself, three other members of the Board had already sat as the Hearing Panel in Case No. 172, a companion case against Petitioner but based on different charges. The charges in Case No. 172 grew out of and resulted directly from the testimony given in Case No. 168 (the one ultimately resulting in Petitioner's indefinite suspension). (Case No. 172 was later dismissed after Petitioner was indefinitely suspended.)

Furthermore the day the Board met to decide Petitioner's fate as a judge, only a two and one half hour meeting was held wherein matters other than Petitioners' were presented. No one could have read the 1408 page transcript in that brief time, let alone all fourteen members.

Petitioner further attacked the concept of double and sometimes triple hearsay which results in such Panel-Board-Supreme Court disciplinary proceedings and also averred that "... the statutory scheme for disciplinary (sic) attorneys in the State of Ohio is itself unconstitutional." Petitioner thus asserted violations of the First, Fifth, Sixth, Ninth and Fourteenth Amendments.

On September 1, 1972 the Ohio Supreme Court entered an order to show cause why Petitioner should not be suspended and then on September 8, 1972, by order Petitioner was suspended from his position as judge pending final disposition of his case by the Ohio Supreme Court. All this was likewise done without a hearing on the question of his removal temporary or otherwise, and all done in violation of specific statutory provisions and court rules for the removal of judges.

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A *pro se* motion to reconsider the temporary suspension was likewise denied. On October 17, 1972 newly obtained counsel for the Petitioner filed a Motion to Quash with the Ohio Supreme Court and on October 20, 1972 the formal objections were filed. Ultimately the case was argued orally before the Ohio Supreme Court and on December 15, 1972 Judge Heitzler was indefinitely suspended from the practice of law.

The United States Court of Appeals for the Sixth Circuit was clearly mistaken when it concluded ". . . that the issues in the State proceeding are identical [with the federal proceeding]". They manifestly were not.

First it must be noted that the federal proceeding challenged, *inter alia*, the entire scheme for disciplining attorneys in the State of Ohio. Second, Petitioner raised serious double jeopardy questions clearly of constitutional proportions arising out of Case No. 172, the companion case to Case No. 168 but embodying different charges against Petitioner. Third, the issue relating to double and perhaps triple hearsay in the grievance proceedings alone was raised in federal court. Fourth, and finally, Petitioner in his federal complaint sought vindication of his federal cause of action for deprivation of his civil rights under color of state authority. Hence, the issues presented to the federal court were *not* identical to those presented to the state court.

Petitioner, therefore submits that the "special circumstances" required by the recent decision of this Court in *Younger* v. *Harris*, 401 U. S. 37 (1971) have been completely satisfied by the facts and allegations pleaded in the complaint and that federal injunctive

relief against state disciplinary proceedings was entirely proper.

But even a stronger case for federal injunctive intervention is presented when one reconsiders the tragic case of John Ruffalo. This Honorable Court in 1968 ummistakably decided that the Ohio disciplinary proceedings conducted against John Ruffalo were devoid of due process. See *In Re Ruffalo*, 390 U.S. 544 (1968), where this Honorable Court expressly held that Ruffalo had been denied due process of law. Notwithstanding this holding of the United States Supreme Court concerning procedural due process, the Ohio Supreme Court little more than a month ago refused to reinstate Ruffalo to the practice of law. See DD-57 On The Disciplinary Docket Of The Ohio Supreme Court, *In Re Petition For Reinstatement of John Ruffalo, Jr.*, found in Volume XLV, *The Ohio Bar*, at 1654, December 4, 1972.

Reading the complaint in the instant case together with the tragic history of the disciplinary proceedings conducted against John Ruffalo, it is little wonder that the same federal district judge who presided in the original proceedings in the *Ruffalo* case reacted so strongly in the present case when he was again presented with an equally serious situation involving substantial violations of procedural due process. In essence then the requisite bad faith and "special circumstances" required by *Younger*, *supra*, are apparent. Most certainly, the district court had jurisdiction and at least deserved the right to take some evidence concerning Petitioner's claims prior to a mandate from the Sixth Circuit ordering the District Court to divest itself of its lawful jurisdiction already assumed.

An alternative form of relief, should this Honorable Court grant the Petition for Writ of Certiorari, would be to reinstate the complaint in Federal District Court and permit an evidentiary hearing to be held on the merits of the issuance of the preliminary and/or permanent injunction. The issue of federal jurisdiction would then be more clearly presented.

Persuasive in this respect is the wisdom of Chief Justice Marshall speaking in *Cohens* v. *Virginia*, 6 Wheat. 264, 5 L. Ed. 257:

> "It is most true, that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legisture may, avoid a measure, because it approaches the confines of the constitution. *** With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."

Furthermore, Congress is empowered under Article 3 of the United States Constitution to limit the jurisdiction of federal courts. Clearly then the federal courts can have only such power and should exercise only such power as Congress has dictated, *Ex Parte, McCardle*, 7 Wall.506, 19 L. Ed. 264 (1869); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953). Unmistakably 28 U.S.C. 1343(3) and (4) provide that the district courts *shall* have original jurisdiction in cases involving the deprivation under color of state authority of those constitutional

rights protected by 42 U.S.C. §1983 and equitable relief can properly be invoked.

Respondents will obviously place great reliance upon the Second Circuit decision of *Erdman* v. *Stevens*, 458 F.2d 1205 (2nd Cir. 1972) cert. denied, 41 U.S.L.W. 3167 (October 10, 1972). At first blush the *Erdman* decision does in fact bear some similarity to the instant case. However, a closer reading of Erdman substantiates Petitioner's position on numerous grounds.

First of all, the court in *Erdman* admits that the federal district court in fact had jurisdiction in a civil rights suit brought pursuant to 42 U.S.C. 1983. Secondly, the decision appears to leave open federal intervention in state proceedings for interpretation on a case by case basis. Third, the fatal defect in the plaintiff's case in *Erdman* was the conclusory allegations in the complaint he filed—an issue that has been expressly avoided by Petitioner in the instant case.

Fourth, Petitioner submits and has already discussed that the standard required by *Younger* v. *Harris, supra*, involving "special circumstances" has been met—assuming that the *Erdman* decision is correct in holding that the disciplinary proceedings are more "criminal" than "civil". See *Erdman* v. *Stevens*, 458 F2d at 1210-1211. Fifth, having read the complaint in the instant case and the history of John Ruffalo's case, there is every reason to assume that the constitutional rights Petitioner asserted in federal district court were not and have not been protected by the Ohio Supreme Court in the appellate review. Sixth, while *Erdman* was undeniably decided after *Younger* v. *Harris*, it was decided before this Honorable Court's most recent decision in *Mitchum* v. *Foster*, 407 U.S.

225 (1972). Seventh, and finally, even assuming arguendo that *Erdman* is in point, it is the law of the Second Circuit. The district court in the instant case was wholly justified in following the wisdom of the Sixth Circuit in *Taylor* v. *Kentucky Bar Association* and the subsequent opinion on remand. For all these reasons, the *Erdman* decision is not contrary to the position advanced by Petitioner herein.

The complaint filed in this case alleges all of the necessary facts to establish a cause of action under the Civil Rights Act and all of the facts necessary to establish original jurisdiction in the United States District Courts. The jurisdiction for violation of the Civil Rights Act is original in the Federal Courts because no state court has jurisdiction to grant the relief that Federal Courts can grant for an alleged violation of that Act of Congress.

Furthermore, in the instant case, the jurisdiction of the Federal Court is exclusive. Heitzler was being tried by an arm of the Supreme Court of Ohio, and the matter had been presented to that Court. This, then, was the very body that was effectively at the time depriving him of his civil rights. To think that the same body would change direction and somehow vindicate these rights which were clearly being abridged is absurd, particularly in view of the fact that Motions to Dismiss, Recuse the Board, and stay the proceedings had not previously been granted, and further, in view of the fact that that same body itself promulgated the rules so totally lacking in due process.

Obviously, no lower Ohio Court could take jurisdiction because the Supreme Court of Ohio was then acting as rule maker and prosecutor. And no other Court

could take jurisdiction because original jurisdiction is vested in the Federal District Court under Title 28 §1343. Therefore, Heitzler followed the *only* available remedy available to him.

Once a complaint alleges the necessary facts to establish jurisdiction and the necessary facts setting forth a cause of action under a Federal law, the Federal Courts must take as true those allegations in determining the issue of whether or not it should proceed to exercise its jurisdiction. It has no discretion and the Federal Court must take jurisdiction and must proceed in the case if the necessary facts are sufficiently alleged, as is the case here. The question of whether or not Heitzler may prevail in his District Court action is not in issue; that is a matter to be determined initially by the District Court and then by appeal to the Court of Appeals, if necessary. It is respectfully submitted that the Court of Appeals cannot, by issuing a Writ of Mandamus totally lacking in authority, divest a federal district court of its original jurisdiction, in a civil rights case where the jurisdictonal facts are sufficiently alleged in the complaint.

In the instant case, not only did the United States Court of Appeals for the Sixth Circuit issue such an unprecedented order, which order resulted in divesting the original jurisdiction of a federal district court, but it did so before the Judge of that Court ever had a chance to hear the case. That Court merely entered a temporary restraining order to maintain the status quo prior to a hearing on a properly filed civil rights complaint, and the Sixth Circuit Court of Appeals divested that jurisdiction. That ruling denied (1) a hearing in the original suit properly brought, and (2) denied the

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judicial discretion of a federal district Court Judge to decide if abstention was proper. This it did without legal authority and without precedent.

In the very delicate and sensitive area of Federal-State relations the Federal Courts should not interfere with areas which are clearly within the sole province of the state, such as disbarrment proceedings and criminal proceedings. However, the larger issue of whether the Federal Court should interfere in such proceedings depends upon the presentation to the Federal District Court of particular and specific constitutional issues which rise above the non-desireability of Federal Court interference.

Clearly a bad faith prosecution which in light of the previous actions and previous cases of the Ohio Supreme Court exist here, would indicate that the Federal District Court should be entitled to make a full scale determination and hold hearings to determine whether the Petitioner's claim of constitutional infringement is substantial, warranting an injunction against the Supreme Court of Ohio for serious and substantial infringement of Petitioner's constitutional rights.

The Sixth Circuit Court of Appeals does not understand the proper role of the Federal Courts in this sensitive and delicate area.[1]

---

[1]See for example, *Burks* v. *Perk, Mayor*,—— F.2d——, (6th Cir. November 17, 1972, No. 72-1368), as evidence of bad faith and since the Supreme Court of the United States opinion *In Re Ruffalo*, 390 U.S. 544 (1968), deciding that Ruffalo had been denied due process of law, the Ohio Supreme Court has refused to reinstate Ruffalo to his right to practice law, even though he was denied due process of law. 45 Ohio Bar 1654, December 4, 1972, DD-57.

Therefore, the following principles are clear: First the United States Court of Appeals for the Sixth Circuit had no right to issue the Writ of Mandamus prior to hearing by the Federal District Court, because to do so divested that Court of original jurisdiction without allowing the District Judge to exercise his discretion in a positive manner.

Second, the Federal District Court had original jurisdiction, and in this case, exclusive jurisdiction of the claimed violation of Heitzler's Federal civil rights, and the Court of Appeals was without power to divest Heitzler of a full hearing on his claim.

Third, the action of the Court of Appeals for the Sixth Circuit is so contrary to law and reason, reversal is required.

II.

The Venue for the Federal Civil Rights Action Based Upon 28 U. S. C. §1392 (a) Was Proper in a Case Where the Individual Justices of the Ohio Supreme Court Are Named as Defendants, and Where Two of the Individual Justices of the Ohio Supreme Court Reside in the Northern District of Ohio, and the Balance of Them Reside in the Southern District of Ohio, Where the Main Office of the Supreme Court of Ohio Is Situated in Columbus, Ohio, in the Southern District, and Where by Statute the Ohio Supreme Court is Authorized to Sit and Act Anywhere in the State of Ohio and Where the Suit is Brought in the United States District Court for the Northern District of Ohio.

Petitioner submits that the venue in the case at bar based upon 28 U.S.C. §1392(a) was proper and that the case should not have been dismissed.

Petitioner alleged in his complaint that Lloyd O. Brown and J. J. P. Corrigan, two of the individual

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justices of the Ohio Supreme Court, lived in the Northern District of Ohio. The remaining five members of the Ohio Supreme Court are alleged to reside in the Southern District of Ohio. The main office of the Supreme Court of Ohio is situated in Columbus, Ohio, in the Southern District, but, of course, the orders entered and the acts taken by the Supreme Court of Ohio are effective statewide, and that Court by statute is authorized to sit anywhere in the State of Ohio. Title 25 O.R.C. §2503.34.

Title 28 U.S.C. §1392(a) was designed for just such a case as this. Frequently state officials have been held to be "resident" in the district in which they live. See *Thompson, et al.* v. *Spear, et al.*, 91 F.2d 430 (C.C.A. 5th 1937) cert. denied, 302 U.S. 762 (1938); *Northern Indiana Public Service Co.* v. *Public Service Commission of Indiana, et al.*, 1 F. Supp. 296 (D.C. N.D. Ind. 1932); *Smith, et al.* v. *Merrill, et al.*, 81 F. 2d 609 (5th 1936); *Gunn* v. *Mathis*, 157 F. Supp. 169; *Heard, et al.* v. *Ouachita Parish School Board, et al.*, 94 F. Supp. 897 (D.C. W.D. La. 1951); *United States* v. *Mississippi, et al.*, 380 U.S. 128 (1965), 1 Moore's Federal Practice ¶¶ O.142 (1) at p. 1453; 0.142 [2.-1] at page 1456; 0.142 [5.-2] at page 1484; 0.143 (1) at page 1552; 0.143 (2).

In the *Gunn* decision, the district court held that the fact that the defendants were public officials did not exempt them from the provisions of this section fixing venue of actions against defendants residing in different districts in the same state. See also *Herd* v. *Ouachita Parish School Board, supra.*

Further the individual members of the Ohio Supreme Court are authorized to exercise their judicial powers

in Columbus, as well as anywhere else in the State of Ohio. See Title 25, Ohio Revised Code, §2503.34. The justices of the Ohio Supreme Court may certainly act where they reside, such as signing orders or writs in the district of their own home residence. Additionally, the Board of Commissioners on Grievances and Discipline and the three man Hearing Panel, part of the disciplinary scheme for members of the Bar of Ohio, and an arm of The Ohio Supreme Court, are authorized to and do in fact act statewide and in the Northern District of Ohio.

For these reasons Petitioner submits that venue is proper in the Federal Court in the Northern District of Ohio and in the alternative, should the venue have been held to be improper, the case should have been transferred instead of dismissed, inasmuch as jurisdiction was first lawfully assumed.

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CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted. It is also respectfully requested that a stay order be entered staying the effect of the *per curiam* order and opinion rendered on November 10, 1972, by the United States Court of Appeals pending disposition of this Petition for Writ of Certiorari.

Respectfully submitted,

Stanley E. Preiser
PREISER & WILSON
1012 Kanawha Boulevard, East
Post Office Box 2506
Charleston, West Virginia 25329
Telephone: 304/344-9651

Counsel for George S. Heitzler, Jr., Intervenor below and real party in interest, Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that I served three true and correct copies of the foregoing Petition for Writ of Certiorari, and three copies of the Appendix upon Victor E. DeMarco, Esquire, of the law firm of Jones, Day, Cockley & Reavis, 1750 Union Commerce Building, Cleveland, Ohio, 44115, attorneys for Respondent, and upon the Honorable Frank J. Battisti, Chief Judge of the United States District Court for the Northern District of Ohio, at Cleveland, United States Court House, Cleveland, Ohio, by depositing same in the United

States mail, postage prepaid by air mail, this 7th day of February, 1973.

Stanley E. Preiser

STANLEY E. PREISER
Of Counsel for Petitioner

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Supreme Court, U. S.
FILED
FEB 8 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

October Term, 1972

No. 72-1091

HONORABLE FRANK J. BATTISTI,
Chief Judge, United States
District Court for the Northern District of Ohio,
Petitioner,
and
GEORGE S. HEITZLER, JR.,
Intervenor below,
Petitioner,
vs.
HONORABLE C. WILLIAM O'NEILL,
Chief Justice of Ohio, et al.,
Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STANLEY E. PREISER
PREISER & WILSON
1012 Kanawha Boulevard, East
Post Office Box 2506
Charleston, West Virginia 25329
Telephone 304/344-9651

Counsel for George S. Heitzler, Jr., Intervenor below and real party in interest, Petitioner.

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
JUDGE GEORGE S. HEITZLER, JR.

Division of Domestic Relations,
Court of Common Pleas,
Hamilton County, Ohio
Hamilton County Court House
Cincinnati, Ohio 45202

Plaintiff,

vs.

C. WILLIAM O'NEILL, Chief Justice,
LOUIS J. SCHNEIDER, JR., Associate Justice,
J. J. P. CORRIGAN, Associate Justice,
LLOYD O. BROWN, Associate Justice
THOMAS M. HERBERT, Associate Justice,
LEONARD J. STERN, Associate Justice,
ROBERT E. LEACH, Associate Justice,

and all members of the bench of the Supreme Court of Ohio, State House Annex, Columbus, Ohio 43215

Defendants.

C72-1140
Civil No. .....
Judge Battisti

Filed
Oct. 24, 1972
At 5:15 O'clock P.M.
Dominic J. Cimino, Clerk
U.S. District Court,
N. D. O.

COMPLAINT

I. Jurisdiction

Jurisdiction of this Honorable Court is invoked pursuant to the First, Fifth, Sixth, Ninth, and Fourteenth Amendments of the Constitution of the United

States, and pursuant to Title 28, U.S.C. Sections 1343 (3) and (4) for alleged violations of 42 U.S.C. Section 1983.

II. Parties

Plaintiff is the duly elected Judge of the Division of Domestic Relations of the Court of Common Pleas of Hamilton County, Ohio; Defendant, C. William O'Neill, is the duly elected and acting Chief Justice of The Supreme Court of Ohio; and the remaining Defendants are the duly qualified and acting Associate Justices of The Supreme Court of Ohio; all of the Defendants comprising of the entire Bench of The Supreme Court of Ohio. Lloyd O. Brown and J. J. P. Corrigan reside in the Northern District of Ohio. All other Defendants reside in the Southern District of Ohio. Venue is based on 28 U.S.C. § 1392.

III. Facts—Case No. 168

A. On the 11th day of August, 1971, three members of the Cincinnati Bar Association, namely R. O. Klausmeyer, John J. Getgey and C. Donald Heile, filed with the Board of Commissioners on Grievances and Discipline of The Supreme Court of the State of Ohio a Complaint and Certificate against George S. Heitzler, Jr., Judge of the Court of Common Pleas (Division of Domestic Relations) of Cincinnati, Hamilton County, Ohio, wherein eleven (11) paragraphs recited certain alleged acts on the part of George S. Heitzler, Jr., which allegedly constituted grounds for misconduct as a judge, assigning violations of certain Canons of Judicial Ethics. (A copy of the Complaint is attached hereto and made a part hereof, and is marked as Exhibit 1.)

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B. On the 9th day of September, 1971, George S. Heitzler, Jr., filed an Answer with said Board denying the charges. (A copy of the Answer is attached hereto and made a part hereof, and is marked as Exhibit 2.)

C. On October 4, 1971, Defendant filed a Supplemental Complaint wherein two (2) additional charges of alleged acts of misconduct were filed against the Plaintiff. (A copy of the Supplemental Complaint is attached hereto and made a part hereof, and is marked as Exhibit 3.)

D. On October 27, 1971, Plaintiff filed an Answer to the Supplemental Complaint denying those charges. (A copy of the Supplemental Answer is attached hereto and made a part hereof, and is marked as Exhibit 4.)

E. The Complaint and Answer, and the Supplemental Complaint and Supplemental Answer designated as Case No. 168, came on for hearing, commencing December 16, 1971, before a Hearing Panel of the Board of Commissioners; the hearings lasted approximately six days during which time testimony was taken and transcribed; and on January 7, 1972, the hearing before the Hearing Panel of the Board of Commissioners was concluded. (A copy of the certified transcript, Volumes I to VI, are filed with the United States District Court in Cleveland, Ohio.)

F. That during said hearings Plaintiff moved to dismiss the charges filed against him in the Supplemental Complaint, and the Hearing Panel reserved a ruling on said Motion to Dismiss.

G. At the conclusion of testimony and after the Hearing Panel reserved their ruling on Plaintiff's Mo-

tion to Dismiss the Supplemental Complaint, the Hearing Panel set forth a well-defined time schedule for the filing of all briefs on the original Complaint in Case No. 168, and a well-defined time schedule for the filing of briefs on the Plaintiff's Motion to Dismiss the Supplemental Complaint.

Both sides filed their briefs on the Motion to Dismiss the Supplemental Complaint within the time allowed.

H. The Hearing Panel had provided, as to the time for filing briefs on the merits of Case 168, that the Defendant was to have two weeks following notice of the ruling of the Hearing Panel on Plaintiff's Motion to Dismiss the Supplemental Complaint, and Plaintiff was to have two weeks after receipt of Defendant's brief to file his brief.

However, the Hearing Panel on August 4, 1972, without notice to the Plaintiff, filed their Findings of Fact and Recommendations with the Secretary of the Board of Commissioners and at the same time sustained Plaintiff's Motion to Dismiss the Supplemental Complaint. (A copy of the Findings of Fact and Recommendations of the Hearing Panel is attached hereto and made a part hereof and is marked as Exhibit 5.) Thus, Plaintiff, although originally granted time by the Hearing Panel to file a brief on the merits of Case No. 168, was denied the right to file that brief because the Hearing Panel decided the case on the merits and made their recommendations and findings of fact weeks before Plaintiff's brief on the merits was due to be filed in accordance with the Hearing Panel's own ruling.

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I. The Board of Commissioners filed its Findings of Fact and Recommendations with the Secretary of the Board on September 1, 1972. (A copy of the Findings of Fact and Recommendations of the Board of Commissioners is attached hereto and made a part hereof, and is marked as Exhibit 7.)

Plaintiff and his counsel did not learn of the aforesaid action of the Hearing Panel or Board until the night of September 1, 1972, when they read in the newspapers that the Board of Commissioners had filed with the Secretary of the Board its Findings of Fact and Recommendations. No formal notice from the Board or Secretary of the Board was received by Plaintiff or his attorneys until September 5, 1972.

J. Immediately thereafter one of the attorneys of record for Plaintiff telephoned the Secretary of the Board of Commissioners and requested on behalf of Plaintiff a copy of the Hearing Panel's findings and recommendations and was told the same was not available to Plaintiff. Counsel for Plaintiff then on September 5, 1972, wrote to the Secretary of the Board again requesting that report, which request was apparently ignored. Thereafter, Judge Heitzler personally wrote to the Secretary of the Board requesting a copy of the Panel's findings and recommendations. Finally on September 20, approximately 45 days after being filed with the Secretary of the Board, and 19 days after the Board of Commissioners had filed its findings and recommendations, a copy of the Hearing Panel's Findings of Fact and Recommendations was sent to Plaintiff.

K. Plaintiff, therefore, says that the Hearing Panel violated its own rulings and denied Plaintiff the effec-

tive assistance of counsel and the right to file a brief on the merits of the case and, the Board of Commissioners made their Findings of Fact and Recommendations without giving Plaintiff the right to be heard and without giving Plaintiff the right to file a brief on the merits.

Plaintiff further says that he was denied due process of law and the right to counsel when R. O. Klausmeyer acting on behalf of the Defendant on August 9, 1972, filed a brief on behalf of Defendant with the Hearing Panel, and in his covering letter recited that he knew he was filing that brief before it was due. In that very same letter, Mr. Klausmeyer recited and acknowledged that by filing the Defendant's brief early he did not intend to impose upon Plaintiff any obligation to file his brief at a time earlier than that previously assigned. (A copy of the cover letter sent by R. O. Klausmeyer is attached hereto and made a part hereof, and marked as Exhibit 7.) As a consequence, the Board of Commissioners had before it in their consideration of the merits of this case, only the brief of Relator, and denied Respondent any right to argue, discuss, or brief the merits of the case.

L. Plaintiff further says that on the same day the Hearing Panel filed with the Secretary of the Board of Commissioners their Findings of Fact and Recommendations, to-wit on August 4, 1972, the Board of Commissioners met from only 2:00 p.m. to 4:30 p.m. on that day, and they recommended that Respondent be indefinitely suspended from the practice of law. At that meeting only fifteen (15) members of the Board of Commissioners attended. Two were absent and Mr. Gordon Scherer although present, allegedly did not dis-

cuss the proceedings in this case, nor vote on the same. Messers. Snyder and Green were absent. (A copy of the extract of the minutes of the meeting held on August 4, 1972, is attached hereto and made a part hereof, and is marked as Exhibit 8.)

M. Plaintiff says that the presence of Mr. Gordon Scherer during the deliberations of the Board of Commissioners on Grievances and Discipline constituted an undue and coercive influence upon the deliberations of the Board. He was present during the deliberations conducted with respect to this case, as the minutes of the Board demonstrate although "[he] took no part in the discussion or voting in Case No. 168." (See Exhibit 8.) Respondent submits that even though he did not vote and did not participate in the discussions, this does not vitiate the fact that Gordon H. Scherer testified for the Defendant in this case, and was also the same person who had previously "played a key role in launching the scheduled Grand Jury investigation of the Hamilton County Domestic Relations Court," seeking to have Respondent, George S. Heitzler, Jr., indicted. (See the attached newspaper article, attached hereto and made a part hereof, and marked as Exhibit 9, and the publicized portion of the Grand Jury report, attached hereto and made a part hereof and marked as Exhibit 10.) The Grand Jury which considered the evidence presented in part by Mr. Gordon H. Scherer did *NOT* return an indictment against Respondent.

Further, Gordon H. Scherer was the Chairman of the Hamilton County Republican Central Committee and was a member of the Executive Committee of the Ohio State Republican Organization. He had recom-

mended that Judge Heitzler be endorsed as the Republican candidate for the Domestic Relations Court. Relations apparently soured between Scherer and Judge Heitzler sometime during 1970.

Next came the attempt to indict Judge Heitzler. Gordon H. Scherer testified on recross examination during the Panel hearings that he was "very critical of * * * the Prosecutor's handling of the case." Furthermore, during the Panel hearings, Gordon H. Scherer quoted with obvious displeasure portions of the record from the public portion of the report of the Grand Jury.

Finally, of all seventeen Board members, Gordon H. Scherer was the only member from Hamilton County. As a result, Plaintiff says that it was probable that his testimony was given great weight by the Panel and in turn by the Board on which he sat.

N. Plaintiff therefore submits that the proceedings before the Board of Commissioners are open to grave questions concerning the impartiality of the proceedings before it and the proceedings thus conducted were violative of due process.

O. Plaintiff says that the Board of Commissioners were prejudicially and unconstitutionally constituted and their action was and is unlawful, and unconstitutional because three members of that Board who sat and made findings and recommendations in Case No. 168, had heard evidence in Case No. 172, a pending companion case involving this same Respondent, but based upon different charges.

Case No. 168 was heard in December of 1971. Case No. 172 was heard in May of 1972. The charges against

Plaintiff in Case No. 172 grew out of and were a direct result of the Board's investigation into Case No. 168. Even though Plaintiff was formally charged in Case No. 172, he had already testified in Case No. 168 as to the charges brought against him in May in Case No. 172. Determination by the Board of Case No. 168 was finalized and filed in September, 1972. The fifteen (15) man Board of Commissioners on Grievances and Discipline which heard and passed on Case No. 168 included Roger H. Smith, Erle Bridgewater and John O. Henry, who constituted the Hearing Panel that had originally heard Case No. 168. The Panel that heard Case No. 172 before Case No. 168 was finalized included; Norman Webster, Howard Lutz and John C. Sheppard. These men also sat on the Board that filed the final report in 168 and Mr. Lutz signed as Chairman of the Board the final recommendation in 168.

Plaintiff says that the three members have played a dual role and have been privy to information that undoubtedly improperly influenced their judgment and that the Board of Commissioners was prejudicially and unconstitutionally constituted and their action was therefore unconstitutional and unlawful.

P. Even though the Board of Commissioners at their 2½ hour meeting on August 4, 1972, stated that the recommendations of the Hearing Panel in Case 168 were "unanimously" adopted by the Board, the facts are that it was only unanimously adopted by fourteen (14) members of a seventeen (17) man board. As above noted, two members were absent and Gordon Scherer did not vote.

As well, the transcript of testimony in Case 168 before the Hearing Panel and presented to the Board of

Commissioners to be considered during their 2½ hour meeting was 1408 pages in length, and it is respectfully submitted that there was only one copy available and that no member of the Board of Commissioners could have read that transcript of testimony (much less all of them) in the 2½ hour meeting. Additionally, during the same 2½ hour meeting, matters other than Case 168 were considered.

Plaintiff therefore further alleges that there was a total abrogation of the duties and responsibilities of the Board of Commissioners and an unconstitutional and unlawful delegation of their authority to the Hearing Panel, especially when the Findings of Fact and Recommendations of the Board of Commissioners are almost word for word the same as the Findings of Fact and Recommendations of the Hearing Panel. (Compare Exhibits 5 and 6.)

Q. Of all the charges filed against the Plaintiff in the original and supplemental complaints, the Board found as follows:

1. From time to time between late 1969 and September, 1970 Plaintiff, was married to his first wife yet was separated and living in an apartment apart from her. Living with Plaintiff was his son who was partially invalided following serious surgery involving the pitutiary gland. The son needed and still needs medication which, for the most part cannot be self administered. As a result, during the time period abovementioned, Carol Chasteen, now Plaintiff's present wife attended to the various needs of Plaintiff's son. The transcript shows that she was paid for her services although no tax deductions were taken therefor.

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Plaintiff was formally separated from his first wife in January of 1970 and the divorce decree was final in October of 1970. During this time Plaintiff maintained a close relationship with his present wife. The Board of Commissioners found that the conduct of the Plaintiff and his present wife gave the impression that they were co-habitating during the time period Plaintiff was separated from his first wife.

The Board apparently gave great weight to the testimony that Carol Chasteen was seen on one occasion in Plaintiff's apartment shaking out rugs in her robe in the early morning. No date was specified as to when this alleged instance occurred, and it could have occurred after the marriage. To the contrary, testimony was presented to demonstrate that Carol Chasteen was rendering care to Plaintiff's son that would have been the equivalent of that given by a practical nurse. Neither Plaintiff nor Miss Chasteen's devotion to Plaintiff's son was questioned.

Contrary evidence of co-habitation affirmatively appeared in the affidavits of Carol Chasteen Heitzler and Geoffrey Heitzler attached hereto and made a part hereof, and marked as Exhibits 12 and 13 wherein they each deny that Plaintiff and Carol Chasteen were living together prior to their marriage.

Plaintiff says further that the testimony of Mr. Grecco relied upon to establish the appearance of co-habitation is so biased as to not be worthy of any probative value in the considerations of this Honorable Court.

Nevertheless the Board found:

> ". . . that the conduct of Respondent in relation to Miss Chasteen's (Judge Heitzler's present wife) presence in Respondent's apartment gave the appearance of cohabitation and therefore impropriety in violation of Canon 4 of the Judicial Ethics,"

and for this violation, taken alone, the Board recommended a private reprimand. For the reasons set out above, Plaintiff says the Board made this finding without evidence to sustain it, therefore denying to Plaintiff due process of law.

2. Plaintiff, while Judge of the Division of Domestic Relations served as a director of a Kentucky corporation known as Harmony Loan Company, authorized to do business only in Kentucky, not in Ohio where Respondent served as a Judge. During the period of 1964 to August, 1971, Respondent did not participate in management and was not active in the business, nor did he attend directors' meetings during this period. He invested a total of $30,000.00 composed of his son's and his wife's money in this corporation in the form of non-voting stock and five and ten year debentures. Plaintiff says that there is no evidence that Respondent at any time used the power of his office or name to promote the business. The Board has stated that Plaintiff permitted his name to be used in a prospectus used in connection with the sale of debentures—and also permitted his name and biography—to be used.

An examination of the prospectus in question reveals that the address of Respondent is incorrect, and the biographical information contained therein is also in-

correct. Plaintiff submits that this erroneous information in the prospectus proves that he did not have knowledge of the brochure or prospectus which had been circulated without his knowledge.

There is absolute no evidence that Respondent knew of the prospectus involved and no evidence that the Respondent permitted or used the power of his office or the influence of his name to promote the business interests of others. The contrary is shown in affidavits of Respondent Heitzler and Frank Spampinato, Vice President of said Harmony Loan Company, (which affidavits are attached hereto and made a part hereof and are marked as Exhibits 14 and 15.)

Nonetheless, the Board concluded at page 10 of their Findings that:

> ". . . Respondent violated Canon 25 by using the power of his office and the influence of his name to promote the business interests of other; . . ."

For this violation, coupled with those charges discussed below in paragraphs 3 and 4, the Board recommended an indefinite suspension.

Canon 25 of the Canons of Judicial Ethics does not specifically state that a judge cannot be a member of a Board of Directors. It only prohibits allowing one to permit the power of his office or name to be used for influence. Plaintiff says that the facts show that this did not happen in this case.

Further Plaintiff says that the Findings and Recommendations of the Board of Commissioners as to

an alleged violation of Canon 25 violated due process, in that Respondent's conduct conformed to the basic judicial standard existing in Cincinnati, Ohio. An affidavit of Mr. Wilbert F. Stagenhorst shows the results of an investigation establishing the judicial standards in this regard in Ohio, in that other judges in Ohio are on various Boards of Directors. (That affidavit is attached hereto and made a part hereof and is marked as Exhibit 16.) Plaintiff says that this affidavit reveals the standard in the community regarding the membership of judges on boards of financial institutions and corporations which standard is that it is common and proper for judges to be members of these boards. It is to be noted further that this affidavit covers only financial institutions located in Ohio and does not cover business or charitable enterprises which, of course, come under the same Canon. Plaintiff says he did not violate Canon 25, and there is no evidence to substantiate this finding, and to so hold violates the due process clause of the Fifth and Fourteenth Amendments and the right to invest as one wishes secured by the Ninth Amendment.

3. Plaintiff has been charged and found guilty of a violation of Canon 12 because he employed.

> ". . . one he knew or should have known, was not possessed of the required character and fitness." (Page 10 Board findings.).

For this charge, among others, the Board recommended an indefinite suspension.

Plaintiff says that the standard of hiring personnel working for Hamilton County, the policy of the State of Ohio, and the policy of the American Bar Associa-

tion is to rehabilitate those who have a prior criminal record by hiring them. (See the A.B.A. view attached hereto and made a part hereof and marked as Exhibits 17 and 18.)

Rufus Smith had been hired in a nonsensitive position, the purpose of which was to call cases and escort litigants to the proper referee in the Domestic Court of Hamilton County. Mr. Smith was convicted of a felony January 26, 1955, served his time and paid his debt to society. After that one felony he has had no further felony convictions. During Rufus Smith's service with Hamilton County Courts he suffered no arrests or infractions of the law. Plaintiff says that a man whose only felony conviction was in 1955 should be given every opportunity to rehabilitate himself.

Wilbert F. Stagenhorst personally conducted an investigation regarding the employment standards of hiring employees of Hamilton County who have a prior criminal record. (His affidavit showing the results of his investigation was attached hereto and made a part hereof and is marked as Exhibit 19.) This affidavit lists people working for Hamilton County who have prior records. It should be noted that a guard for the County Court, who is still working, has a record which includes charges of serious crimes of violence.

Additionally, as more fully appears from the affidavits attached hereto and made a part hereof and marked as Exhibits 20 and 21, Rufus Smith denies the charges levied against him during the hearings before the Hearing Panel and also explains that he refused to testify because of the pendency of Grand Jury proceedings involving him. His attorney corroborates these facts also by affidavit.

Plaintiff says the Board of Commissioners did not take into consideration the standard in this nation or the State of Ohio or Hamilton County, regarding the hiring of people with a prior record, and in finding that Respondent had violated the Canons of Judicial Ethics in this regard, they failed to follow the minimum standards. Thus, Plaintiff says that he did not violate the existing standard in the community, did not violate Canon 25 of the Canons of Judicial Ethics, and the Board's finding is not based on the evidence and there is not evidence to substantiate such a finding, and therefore, Plaintiff has been denied due process of law. Such conduct should not be prohibited or limited, but should be encouraged.

4. Plaintiff was found guilty of a violation of Canon 13 by suffering his conduct to justify the impression that his favor was unduly enjoyed by another and that he violated Canon 34 in that he was not indifferent to partisan influences. (Findings of the Board, P. 10). For this conduct, coupled with that detailed in Paragraphs 2 and 3, *supra*, the Board recommended an indefinite suspension.

To the contrary, competent evidence was presented by an attorney who had practiced for 30 years before the Domestic Relations Court and who saw no favoritism.

Testimony was introduced by an investigative reporter, Gerald White, which allegedly showed by "random, extensive comparative analysis of the outcome of cases" handled by one attorney that favoritism existed.

Plaintiff says that the statistical material was not random, but was selective. Further, it was biased, in-

complete and not based on settled statistical principles. As such, Respondent says it was entitled to no weight.

Plaintiff was also criticized because he ate lunch with certain named persons thereby creating the impression of favoritism. Plaintiff asserts that the portion of the Findings of Fact based on this testimony is contrary to the First and Fourteenth Amendments' freedoms of speech and association; these rights have been denied to Plaintiff.

Therefore, this finding is not substantiated by the evidence, cannot constitutionally be made, and therefore, Plaintiff was denied due process of law.

5. Finally, the Board found that Plaintiff had violated Canons 4, 13, 25, 26, and 34 of the Canons of Judicial Ethics because he signed numerous judicial orders during his term as Municipal Judge on which bench he served prior to becoming Common Pleas Judge, which orders he signed while Municipal Judge involved Harmony Loan Company of which he was a director. For this the Board recommended a public reprimand.

The orders were signed when Plaintiff was Municipal Judge, not during his term as Domestic Relations Judge. There also was no evidence to prove that Plaintiff heard contested matters.

Plaintiff therefore says: First, that the signatures on the orders entered were purely an administrative and not a judicial function; and second; that the entry of the orders occurred during a prior judicial term; these charges may not now be raised.

Plaintiff says that this finding is not substantiated by the evidence, and therefore, Plaintiff has been denied due process of law.

R. Plaintiff says that the procedure regarding factual findings and recommendations adopted in the case at bar is violative of due process because the ultimate decision rendered by The Ohio Supreme Court is based on double and sometimes triple hearsay.

The three-man Hearing Panel alone sees and hears the witnesses and evaluates their testimony and demeanor. Hearsay is sometimes admitted. The Panel in turn renders its findings and recommendations to a 17-man Board (14 plus the 3-man Panel) who never sees or hears the witnesses. The Panel report is therefore hearsay. Once the Board makes its findings, it in turn sends its hearsay report to The Ohio Supreme Court for a final decision. Thus, The Ohio Supreme Court, likewise, never hears or sees the witnesses. The result, Plaintiff says, is triple or double hearsay, and therefore, is violative of due process of law, and that the statutory scheme for disciplinary attorneys in the State of Ohio is itself unconstitutional.

Therefore, for the reasons stated in the Paragraphs above, Plaintiff states that his constitutional rights as secured by the First, Fifth, Sixth, Ninth, and Fourteenth Amendments have been violated.

S. On September 1, 1972, The Supreme Court of Ohio entered an Order directing Plaintiff to show cause why the recommendations of the Board of Commissioners should not be confirmed and a disciplinary order entered. (A copy of the Order to Show Cause is attached hereto and made a part hereof, and is marked as Exhibit 22.) And then, on or about September 7, 1972, Defendant Chief Justice and Associate Justices, with the exception of Defendant, Louis

J. Schneider, Jr., who had previously disqualified himself from participating in the consideration of matters involving Plaintiff, did cause to be entered upon the Journal of The Supreme Court of Ohio, a per curiam Order suspending Plaintiff from exercising any further judicial duties until The Supreme Court of Ohio rendered its decision and judgment in the matter. (A copy of the per curiam Order is attached hereto and made a part hereof, and is marked as Exhibit 23.)

T. On September 8, 1972, by Order signed by Chief Justice C. William O'Neill, George S. Heitzler, Jr., was directed not to hear any further cases or any other matters pending in the Domestic Relations Division of the Common Pleas Court of Hamilton County, and was also directed not to perform any other judicial duties until The Supreme Court of Ohio renders its final decision. (A copy of the Order signed by Chief Justice C. William O'Neill is attached hereto and made a part hereof, and is marked as Exhibit 24.) Also, on September 8, 1972, by Order of The Supreme Court of Ohio, a retired Judge was assigned to fill the vacancy of the Respondent Judge Heitzler pending further action by The Supreme Court of Ohio. (A copy of the Order entered filling the vacancy is attached hereto and made a part hereof, and is marked as Exhibit 25.)

Plaintiff says that when The Supreme Court of Ohio entered its Order of September 8, 1972, prohibiting the Plaintiff from performing further judicial functions until its final decision in this matter, it violated the Plaintiff's constitutional rights in that he was not granted the due process of law requred by the Constitution of the United States.

Plaintiff was denied a hearing on the question of his removal, temporary or otherwise, and he was denied his statutory rights, assured him by the laws of the State of Ohio, Ohio Revised Code § 2701.11 and § 2701.12, and he was denied the due process required by the procedures set forth in the Rules of The Supreme Court of Ohio for which make specific provisions for the removal of Judges, Gov. R. VI.

The Supreme Court of Ohio in prohibiting Judge Heitzler from exercising further judicial functions relied on Article IV, Section 5 of the Ohio Constitution. Plaintiff says that such conduct results in an unconstitutional application of the Ohio Constitution as applied to Plaintiff in violation of the United States Constitution and its Amendments. In the alternative, if said Article IV, Section 5 of the Ohio Constitution allows a procedure such as was followed here for temporary suspension of the performance of judicial duties by a judge, without a hearing as was done in this case, then said Ohio Constitutional provision is itself unconstitutional because it violates the constitutional right to due process as required by the United States Constitution and its Amendments.

The action taken by The Ohio Supreme Court in prohibiting the Plaintiff from the performing further judicial duties until they rendered their decision and judgment in the case was taken without notice to the Plaintiff, without the right of Plaintiff to counsel, without the right of Plaintiff to a hearing, without the right of Plaintiff to be faced by his accusers, and was also taken in violation of the rights granted to him by the aforementioned statutes of the State of Ohio and the aforementioned Rules of Disciplinary Procedure adopted by The Supreme Court of Ohio.

Plaintiff says that as a result of the foregoing he has been denied his right to due process of law and of his constitutional guarantees in the disciplinary proceedings above mentioned, and therefore, those proceedings were void. Plaintiff further says that the entry of the Order of September 8, 1972, by the Ohio Supreme Court prohibiting him from further judicial action, being entered without notice or hearing, is not only a denial of *his* right to due process and *his* constitutional rights, but is an infringement on the right of the people of the State of Ohio to choose their judicial officers and have them continue to serve in a judicial capacity until and unless they are removed in accordance with the statutory laws of the State of Ohio and the Rules of Procedure in Grievance matters adopted by the Ohio Supreme Court.

U. On September 18, 1972, Plaintiff, *pro se*, filed with the Ohio Supreme Court a Motion for Reconsideration and for a hearing wherein he set forth various grounds which he believed entitled him a reconsideration of the Order previously entered, which Order removed him from acting in any judicial capacity. This Motion was denied. (A copy of the Motion to Reconsider is attached hereto and made a part hereof, and is marked as Exhibit 26.)

V. On October 17, 1972, counsel for Plaintiff filed a Motion to Quash and Dismiss the Findings of Fact and Recommendations of the Board of Commissioners and Motion to Dismiss and Recuse Each and Every Member of the 17-Man Board of Commissioners of Grievances and Discipline which Motion set forth numerous grounds entitling Plaintiff, the Respondent, to the relief sought. (A copy of the Motion to Quash and

Dismiss and to Dismiss and Recuse is attached hereto and made a part hereof, and is marked as Exhibit 27.)

W. On October 20, 1972, Plaintiff filed with The Supreme Court of Ohio his Objections to the Findings of Fact and Recommendations of the Board of Commissioners, wherein he set forth numerous grounds of objection to the various factual findings and conclusions of law rendered by the Board (and embodied in Exhibit 6). (A copy of the Objections to the Findings of Fact and Recommendations of the Board of Commissioners is attached hereto and made a part hereof, and is marked as Exhibit 28.)

IV. Facts—Case No. 172

A. On February 17, 1972, the same three members of the Cincinnati Bar Association who had previously filed charges against Plaintiff in Case No. 168, namely R. O. Klausmeyer, John J. Getgey and C. Donald Heile, filed with the Board of Commissioners on Grievances and Discipline of the Supreme Court of the State of Ohio a Complaint and Certificate against George S. Heitzler, Jr., Judge of the Court of Common Pleas (Division of Domestic Relations) of Cincinnati, Hamilton County, Ohio, wherein Five Charges were lodged against Respondent which allegedly constituted violations of various sections of the Ohio Revised Code, various Canons of Professional Ethics, and a violation of a Rule promulgated by The Supreme Court of Ohio. (A copy of the Complaint is attached hereto and made a part hereof, and is marked as Exhibit 29.)

B. Within the prescribed time period, Respondent filed an Answer with the Board of Commissioners

wherein he made certain admissions of fact and also denied that any of the admitted acts constituted violations of the Ohio Revised Code, the Canons of Professional Ethics, or any Rule promulgated by The Supreme Court of Ohio. Respondent also challenged the jurisdictional basis of the Complaint, and pleaded that double jeopardy barred the claims and that Relator was estopped to bring the charges. (A copy of the Answer is attached hereto and made a part hereof, and is marked as Exhibit 30.)

C. On May 5, 1972, a Formal Notice of Hearing was filed with the Board of Commissioners, said hearing to be held on May 31, 1972, regarding the charges filed in Case No. 172. (A copy of the Formal Notice is attached hereto and made a part hereof, and is marked as Exhibit 31.)

D. On May 11, 1972, Respondent, George S. Heitzler, Jr., filed a Motion to Dismiss with the Board of Commissioners wherein he again challenged the jurisdictional basis upon which Relator sought to act, and again pleaded double jeopardy. (A copy of the Motion to Dismiss is attached hereto and made a part hereof, and is marked as Exhibit 32.)

E. The Motion to Dismiss filed in Case No. 172 was denied.

F. On May 16, 1972, by Entry George D. Young was excused from service as a member of the Hearing Panel in Case No. 172 and Howard S. Lutz was appointed in his place. (A copy of the Entry is attached hereto and made a part hereof, and is marked as Exhibit 33.)

G. The Complaint and Answer designated as Case No. 172 came on for hearing before a Hearing Panel composed of Chairman Norton Webster, Howard Lutz, and John C. Sheppard on May 31, 1972, and a transcript of those hearings was taken and transcribed. (A certified copy of the transcript taken, Volumes I, II, and III is on file in the United States District Court at Cleveland.)

H. The brief on behalf of Respondent as to the merits of those charges embodied in Case No. 172 is now due, or due within a very short, although unspecified, time.

V.

A. At all times, and during all acts alleged in Paragraphs I, II, III A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, and W, and IV A, B, C, D, E, F, G, and H the defendants have acted and are continuing to act pursuant to the Rules of Practice of The Supreme Court of Ohio, the Supreme Court Rules for the Government of the Bar of Ohio (more particulary Rule V, Disciplinary Procedure [formerly Rule VIII of the Rules of the Supreme Court] among other Rules) all of which are promulgated by The Ohio Supreme Court, and also pursuant to Article IV, Section 5 of the Constitution of Ohio, and Plaintiff therefore alleges that the defendants have in the past, and are continuing, and will continue to act under color of the aforementioned rules, regulations, and constitutional provision of the State of Ohio; and

B. Plaintiff alleges that the conduct to which he has been subjected and will continue to be subjected in Case No. 168 as detailed in Paragraphs III A, B,

C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, and W has deprived him of those rights secured to him by the First, Fifth, Sixth, Ninth, and Fourteenth Amendments of the Constitution of the United States as set out above, and such deprivations have arisen under color of state authority as more fully detailed in Paragraph V-A herein, all in violation of 42 U.S.C. §1983; and

C. Plaintiff alleges that the conduct to which he has been subjected and will continue to be subjected in Case No. 172 as detailed in Paragraphs IV A, B, C, D, E, F, G, and H has deprived him of the rights one has against placing himself in double jeopardy which right is secured to him by the Fifth Amendment of the United States Constitution, and further that the deprivation of that right as aforementioned has arisen under color of state authority as more fully detailed in Paragraph V-A herein, all in violation of 42 U.S.C. §1983.

VI.

Plaintiff is suffering and will continue to suffer immediate and irreparable damage if the conduct of defendants is permitted to continue. Further, should the Ohio Supreme Court choose to render a final ruling on Case No. 168 and/or Case No. 172 during the pendency of the proceeding now before this Honorable Court, then this Court might be without jurisdiction to redress those civil and constitutional rights sought to be redressed. To permit The Supreme Court of Ohio to render a final ruling in either or both of the disciplinary proceedings might render the proceedings before this Court moot. Finally, although Plaintiff has not been deprived of his salary, he has been stripped of

every other vestige of his authority as Judge, his reputation in the community is tarnished, and the Judiciary in Hamilton County is suspect. The harm is therefore immediate and irreparable.

VII.

Plaintiff alleges that he has no adequate remedy at law. No amount of monetary damage can reinstate Plaintiff to his rightful position as duly elected and acting Judge of the Division of Domestic Relations of the Court of Common Pleas of Hamilton County, Ohio. Only the equitable relief sought herein will correct the wrongs Plaintiff seeks to redress.

VIII.

Plaintiff says that the indefinite suspension to which he is subjected is unduly harsh and therefore the actions taken against Plaintiff are an attempt:

1. To chill his First and Fourteenth Amendments' rights of freedom of speech and freedom of association; and

2. Are also in violation of Plaintiff's rights to due process of law as embodied in the Fifth and Fourteenth Amendments, and in violation of the Sixth and Ninth Amendments; and

3. Are taken under color of state authority in bad faith and to harass and otherwise intimidate Plaintiff from acting as Judge.

WHEREFORE, Plaintiff prays that this Honorable Court grant the following relief:

1. That this Court assume jurisdiction of this cause.

2. That this Honorable Court immediately issue a temporary restraining order pending the final hearing and determination of this cause, restraining Defendants, or any one of them, their agents, servants, employees, attorneys, successors and all persons and agencies in active concert and participation with them, including but not limited to the Cincinnati Bar Association, and the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, from taking any further action in disciplinary proceeding Case No. 168 and disciplinary proceeding Case No. 172.

3. That this Honorable Court immediately issue a preliminary injunction pending the final hearing and determination of this cause, enjoining Defendants, or any one of them, their agents, servants, employees, attorneys, successors, and all persons and agencies in active concert and participation with them including but not limited to the Cincinnati Bar Association, and the Board of Commssioners on Grievances and Discipline of The Supreme Court of Ohio, from taking any further action in disciplinary proceeding Case No. 168 and disciplinary proceeding Case No. 172.

4. That this Honorable Court enter a preliminary injunction directed to the Defendants compelling them to vacate the Order entered September 8, 1972, which removed Plaintiff as Judge of the Division of Domestic Relations of the Court of Common Pleas of Hamilton

County, Ohio (Exhibit 24) and also; to set aside and vacate the Per Curiam Opinion entered September 7, 1972, suspending Plaintiff from acting as Judge (Exhibit 23).

5. That this Honorable Court enter a preliminary injunction directed to Defendants compelling them to reinstate Plaintiff as the duly elected and acting Judge of the Division of Domestic Relations of the Court of Common Pleas of Hamilton County, Ohio.

6. That the Order entered September 8, 1972, appointing Frank W. Nicholas to fill the vacancy created by the removal of Plaintiff as Judge, be vacated and Judge Nicholas be discharged from acting further as Judge of the Division of Domestic Relations of the Court of Common Pleas of Hamilton County, Ohio, (Exhibit 25).

7. That this Honorable Court grant a permanent injunction enjoining the Defendants, or any one of them, their agents, servants, employees, attorneys, successors, and all persons and agencies in active concert with them, including but not limited to the Cincinnati Bar Association, and the Board of Commissioners on Grievances of The Supreme Court of Ohio from taking any further action whatsoever in disciplinary proceeding Case No. 168 and disciplinary proceeding Case No. 172, and that the preliminary injunction reinstating Plaintiff as Judge and removing his substitute be made a permanent injunction.

8. That this Honorable Court grant such other, additional or alternative relief as may seem necessary and equitable.

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9. That this Honorable Court grant the Plaintiff his costs herein.

GEORGE S. HEITZLER, JR.
Plaintiff

STANLEY E. PREISER
JOHN B. CARRICO
DAVID C. MCCUE

PREISER & WILSON
1012 Kanawha Boulevard, East
Post Office Box 2506
Charleston, West Virginia

Counsel for Plaintiff

VERIFICATION

STATE OF OHIO)
COUNTY OF HAMILTON) SS:

GEORGE S. HEITZLER, being first duly cautioned and sworn, states that he is the Plaintiff herein; and that the facts and allegations contained in the foregoing Complaint are true, except where they are based upon information and belief, and where they are based upon information and belief, he believes them to be true.

George S. Heitzler

Sworn to before me and subscribed in my presence, this 24 day of October, 1972.

Pete J. Donohue
Notary Public, State of Ohio

Pete J. Donohue
Notary Public, Hamilton
County, Ohio

My Commission Expires
May 21, 1973

Filed Oct. 24, 1972 at 5:15 O'clock P.M.
Dominic J. Cimino, Clerk
U. S. District Court, N. D. O.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

JUDGE GEORGE S. HEITZLER, Jr.
Division of Domestic Relations,
Court of Common Pleas,
Hamilton County, Ohio
Hamilton County Court House
Cincinnati, Ohio 45202 Plaintiff,

vs.

Civil No. C72-1140
Judge Battisti

C. WILLIAM O'NEILL, Chief Justice,
LOUIS J. SCHNEIDER, JR., Associate Justice,
J. J. P. CORRIGAN, Associate Justice,
LLOYD O. BROWN, Associate Justice,
THOMAS M. HERBERT, Associate Justice,
LEONARD J. STERN, Associate Justice,
ROBERT E. LEACH, Associate Justice,
and all members of the bench of the
Supreme Court of Ohio
State House Annex
Columbus, Ohio 43215 Defendants.

MOTION FOR A TEMPORARY RESTRAINING ORDER; MOTION FOR A PRELIMINARY INJUNCTION; MOTION FOR A PERMANENT INJUNCTION

PREISER & WILSON
STANLEY E. PREISER
JOHN B. CARRICO
DAVID C. McCUE
Counsel for Plaintiff

PREISER & WILSON
1012 Kanawha Boulevard, East
P. O. Box 2506
Charleston, West Virginia 25329

Comes now the plaintiff, George S. Heitzler, Jr., by counsel, and moves this Honorable Court to grant the following relief:

1. That this Court assume jurisdiction of this cause.

2. That this Honorable Court immediately issue a temporary restraining order pending the final hearing and determination of this cause, restraining Defendants, or any one of them their agents, servants, employees, attorneys, successors and all persons and agencies in active concert and participation with them, including but not limited to the Cincinnati Bar Assocation, and the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, from taking any further action in disciplinary proceeding Case No. 168 and disciplinary proceeding Case No. 172.

3. That this Honorable Court immediately issue a preliminary injunction pending the final hearing and determination of this cause, enjoining Defendants, or any one of them, their agents, servants, employees, attorneys, successors and all persons and agencies in active concert and participation with them, including but not limited to the Cincinnati Bar Association, and the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, from taking any further action in disciplinary proceeding Case No. 168 and disciplinary proceeding Case No. 172.

4. That this Honorable Court enter a preliminary injunction directed to the Defendants compelling them to vacate the Order entered September 8, 1972, which removed Plaintiff as Judge of the Division of Domestic Relations of the Court of Common Pleas of Hamilton County, Ohio (Exhibit 24) and also, to set aside and

vacate the Per Curiam Opinion entered September 7, 1972, suspending Plaintiff from acting as Judge.

5. That this Honorable Court enter a preliminary injunction directed to Defendants compelling them to reinstate Plaintiff as the duly elected and acting Judge of the Division of Domestic Relations of the Court of Common Pleas of Hamilton County, Ohio.

6. That the Order entered September 8, 1972, appointing Frank W. Nicholas to fill the vacancy created by the removal of Plaintiff as Judge, be vacated and Judge Nicholas be discharged from acting further as Judge of the Division of Domestic Relations of the Court of Common Pleas of Hamilton County, Ohio (Exhibit 25).

7. That this Honorable Court grant a permanent injunction enjoining the Defendants, or any one of them, their agents, servants, employees, attorneys, successors, and all persons and agencies in active concert with them, including but not limited to the Cincinnati Bar Association, and the Board of Commissioners on Grievances of the Supreme Court of Ohio from taking any further action whatsoever in disciplinary proceeding Case No. 168 and disciplinary proceeding Case No. 172, and that the preliminary injunction reinstating Plaintiff as Judge and removing his substitute be made a permanent injunction.

8. That this Honorable Court grant such other, additional or alternative relief as may seem necessary and equitable.

9. That this Honorable Court grant the Plaintiff his costs herein.

The grounds in support of this motion are as follows:

1. Plaintiff hereby adopts by reference as though fully set out herein, the Complaint and Exhibits previously filed herein with this Honorable Court which fully states the facts and reasons which Plaintiff contends entitle him to the relief sought herein; and

2. Plaintiff submits that the entire disciplinary proceedings and the Order leading to his indefinite suspension as a Judge of the Division of Domestic Relations of the Court of Common Pleas of Hamilton County, Ohio were violative of Plaintiff's constitutional rights secured to him by the First, Fifth, Sixth, Ninth and Fourteenth Amendments of the United States Constitution.

3. Such proceedings were conducted pursuant to rules and regulations promulgated by The Supreme Court of Ohio, and pursuant to Article IV, Section 5 of the Ohio Constitution, and Plaintiff therefore says he has been deprived of the aforementioned constitutional and civil rights under color of state auhtority and in violation of 42 U.S.C. §1983; and

4. Plaintiff is suffering and will continue to suffer immediate and irreparable damage if the conduct of defendants is permitted to continue. Further, should The Ohio Supreme Court choose to render a final ruling on Case No. 168 and/or Case No. 172 during the pendency of the proceeding now before this Honorable Court, then this Court might be without jurisdiction to redress those civil and constitutional rights sought to be redressed. To permit the Supreme Court of Ohio to render a final ruling in either or both of the dis-

ciplinary proceedings might render the proceedings before this Court moot. Finally, although Plaintiff has not been deprived of his salary, he has been stripped of every other vestige of his authority as Judge, his reputation in the community is tarnished, and the Judiciary in Hamilton County is suspect. The harm is therefore immediate and irreparable.

5. Plaintiff alleges that he has no adequate remedy at law. No amount of monetary damage can reinstate Plaintiff to his rightful position as duly elected and acting Judge of the Division of Domestic Relations of the Court of Common Pleas of Hamilton County, Ohio. Only the equitable relief sought herein will correct the wrongs Plaintiff seeks to redress.

6. If the temporary restraining order and/or the preliminary injunction are/is granted, the injuries to Defendants would be inconsequential.

STANLEY E. PREISER
One of Counsel for Plaintiff

PREISER & WILSON
1012 Kanawha Boulevard, East
P. O. Box 2506
Charleston, West Virginia 25329

Of Counsel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JUDGE GEORGE S. HEITZLER, JR.
Division of Domestic Relations,
Court of Common Pleas,
Hamilton County, Ohio

Plaintiff

vs.

C. WILLIAM O'NEILL, Chief Justice,
LOUIS J. SCHNEIDER, JR., Associate
Justice, J. J. P. Corrigan,
Associate Justice, LLOYD O. BROWN,
Associate Justice, THOMAS M. HERBERT,
Associate Justice, LEONARD J. STERN,
Associate Justice, ROBERT E. LEACH,
Associate Justice, All members of
the bench of the Supreme Court of Ohio

Defendants

BATTISTI, C. J.

Filed
Oct. 25 10:14 A.M. '72
Clerk U.S. District Court
Northern District of Ohio

Temporary
Restraining
Order

This day came the Plaintiff by Preiser and Wilson, and Stanley E. Preiser and David McCue, his attor-

neys, and presented to the Court his verified Complaint, the exhibits attached thereto and his Motion for a Temporary Restraining Order, Preliminary Injunction and Permanent Injunction.

From the pleadings and exhibits and the Motion filed herein, it appears to the Court that the Defendants have committed, are committing, and will commit acts as set forth in Plaintiff's Complaint and will continue to do so unless restrained by this Court, and that immediate and irreparable injury, loss, or damage will result to Plaintiff before this matter can be set down for further hearing;

And it further appearing to the Court that this is a proper case for the issuance of a Temporary Restraining Order without notice.

IT IS, THEREFORE, ADJUDGED, ORDERED AND DECREED:

1. That the Defendants and all persons acting in concert with them be and they are hereby temporarily restrained from taking any further action in disciplinary proceedings against the Plaintiff, Judge George S. Heitzler, Jr. in Disciplinary Proceeding Case No. 168 and Disciplinary Proceeding Case No. 172.

2. That the Defendants are hereby temporarily restrained from enforcing their order of September 8, 1972, which in effect prohibits the Plaintiff from exercising his judicial functions.

IT IS, FURTHER, ADJUDGED, ORDERED AND DECREED that this Temporary Restraining Order take effect immediately without bond.

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ORDERED that this Order will expire ten (10) days after entry unless within such time this order has been extended, and

IT IS FURTHER ORDERED that Plaintiff's Motion for Preliminary Injunction be heard before the Honorable Chief Judge Frank J. Battisti, at the United States Court House in Cleveland, Ohio, on the 2nd day of November at 10:00 o'clock A.M., Eastern Standard Time.

IT IS FURTHER ORDERED that a copy of this order, and of Plaintiff's Complaint, together with proper summons issued by the Clerk of this Court, be immediately served by the U. S. Marshal, or otherwise, upon the Defendants.

FRANK J. BATTISTI
Chief Judge

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest: DOMINIC J. CMINO, Clerk
U. S. District Court
Northern District of Ohio

By: U. Fast
Deputy Clerk

No. 72-2062

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HONORABLE C. WILLIAM O'NEILL, Chief Justice of the Supreme Court of Ohio, et al.

Petitioners,

vs.

HONORABLE FRANK J. BATTISTI, Chief Judge of The United States District Court for the Northern District of Ohio

Respondent.

Filed
Oct. 27, 1972
James A. Higgins,
Clerk

Order

This matter has come on to be considered on petitioners' application for a writ of mandamus and/or prohibition, and on petitioners' motion to stay the temporary restraining order heretofore issued by the District Court and to stay further proceedings therein. The order of the District Court sought to be stayed was issued by respondent herein in cause No. C72-1140 on the docket of the United States District Court for the Northern District of Ohio and restrained the defendants therein, who are the Chief Justice and six Associate Justices of the Supreme Court of Ohio, from taking any further action against the plaintiff in the

District Court action in Disciplinary Proceeding Case No. 168 and Disciplinary Proceeding Case No. 172 on the docket of the Supreme Court of Ohio. It appearing to the Court that said actions are scheduled to be heard by the Supreme Court of Ohio on November 15, 1972, and it further appearing from the petition and exhibits thereto herein that the issues presented are identical to the issues presented herein, and it further appearing that the doctrine of abstention, adherence to which said doctrine is favored by this Court whenever possible, requires that the issues in this case which finds its roots in the judicial system of the State of Ohio be first resolved by the Ohio Supreme Court, and it further appearing that the compensation of the said Heitzler continues and is unaffected by any order heretofore entered by the Supreme Court of Ohio, and accordingly,

IT IS ORDERED that the Petition For Writ of Mandamus and/or Prohibition be and it hereby is set for hearing before this Court on November 16, 1972, and it is further ORDERED that all further proceedings in cause No. C72-1140 on the docket of the United States District Court for the Northern District of Ohio be and they hereby are stayed until November 16, 1972, or until the further order of this Court.

BY ORDER OF THE COURT

JOHN W. PECK
Circuit Judge

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No. 72-2062

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HONORABLE C. WILLIAM O'NEILL,
Chief Justice of Ohio, et al.,
Petitioners,

vs.

HONORABLE FRANK J. BATTISTI,
Chief Judge, United States
District Court for the Northern
District of Ohio.
Respondent.

On Petition for Writ of Mandamus and Prohibition

Filed
Nov. 10, 1972
James A. Higgins,
Clerk

Before: PHILLIPS, Chief Judge, and MILLER and LIVELY, Circuit Judges.

PER CURIAM. This case is before the Court on a petition for writ of mandamus or prohibition, filed by the Chief Justice and the Associate Justices of the Supreme Court of Ohio against the Chief Judge of the United States District Court for the Northern District of Ohio. By authority of the All Writs Statute, 28 U.S. Sec. 1651, we grant the writ of mandamus as prayed in the petition.

Disciplinary action is in process before the Supreme Court of Ohio involving George S. Heitzler, Jr., a Judge of the Court of Common Pleas of Hamilton County, Ohio, at Cincinnati. Judge Heitzler has been charged

by the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio with numerous violations of the Canons of Judicial Ethics. The Board also has recommended that Judge Heitzler be suspended indefinitely from the practice of law.

On September 8, 1972, the Chief Justice of Ohio entered an order, pursuant to the authorization of his court, to the effect that Judge Heitzler hear no further cases or other matters pending in the Domestic Relations Division of the Common Pleas Court of Hamilton County nor perform any other judicial duties until the Supreme Court has rendered its final decision and judgment in the pending matter. See *Cincinnati Bar Association* v. *Heitzler*, 31 Ohio St.2d 187 (1972). On the same day the Chief Justice assigned a retired State Common Pleas Judge to sit temporarily in the Domestic Relations Division of the Court of Common Pleas of Hamilton County.

Judge Heitzler filed action No. C72-1140 in the United States District Court for the Northern District of Ohio, under the Civil Rights Act, 42 U.S.C. Sec. 1983, naming as defendants the Chief Justice and Associate Justices of the State Supreme Court. On October 25, 1972, the United States District Court issued an ex parte temporary restraining order, restraining the Justices of the State Supreme Court "and all persons acting in concert with them" from enforcing the Supreme Court's order of September 8, 1972, or from taking any further disciplinary action against Judge Heitzler.

The petition for writ of mandamus or prohibition was filed in this Court on October 27, 1972. On the

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same date a judge of this Court entered an order staying all further proceedings in the District Court in action No. C72-1140 until November 16, 1972, or until the further order of this Court. This order recites that a hearing is scheduled before the Supreme Court of Ohio on November 15, 1972, that the issues in the State proceeding are identical and that the compensation of Judge Heitzler continues and is unaffected by any order heretofore entered by the State Supreme Court. The order further recites that the doctrine of abstention "requires that the issues in this case which finds its roots in the judicial system of the State of Ohio be first resolved by the Ohio Supreme Court. . . ."

In November 1, 1972, Judge Heitzler filed a motion to intervene in the proceedings in this Court. This motion was granted. Judge Heitzler also has filed in this Court a motion to dissolve, vacate, dismiss or modify the stay order heretofore entered by this Court and a brief in support of his motion. This motion is hereby denied.

This Court is of the view that the issuance of a temporary restraining order by the District Court under the facts of this case was improvident, and that the District Court should have abstained from interfering with the pending proceedings in the Supreme Court of Ohio. As said by the Supreme Court in *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 297:

> "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording

> of Sec. 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion."

It is clear that venue does not lie in the Northern District of Ohio in the action filed there by Judge Heitzler against the Justices of the Supreme Court of Ohio. Under 28 U.S.C. Sec. 1391(b), a civil action must be brought in the judicial district where all the defendants reside or where the claim arose. The official residence of the Supreme Court of Ohio is in the place where it performs its official duties, that is, Columbus, the State Capitol and the seat of State Government. Under Ohio law, regular sessions of the Supreme Court are held only in Columbus. See O.R.C. Sec. 2503.33. Columbus is in the Southern District of Ohio.

> "Where a public official is a party to an action in his official capacity, he resides in the judicial district where he maintains his official residence, that is, where he performs his official duties." 1 Moore's Federal Practice 1487-88.

Judge Heitzler relies upon 28 U.S.C. Sec. 1392(a) as making the Northern District of Ohio a proper venue in this case. We hold that Sec. 1392(a) is not applicable in the present case.

A writ of mandamus will issue as prayed in the petition, *Holub Industries, Inc.* v. *Wyche*, 290 F.2d 852 (4th Cir. 1961).[1] The United States District Court for the Northern District of Ohio is directed:

(1) To vacate and withdraw the temporary restraining order of October 25, 1972, enjoining the Ohio

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[1]It is apparent that the court for purposes of issuing the writ of mandamus equated a "lack of venue" with a "lack of jurisdiction." 290 F.2d at 854.

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Supreme Court from taking any further action in disciplinary proceedings against Judge George S. Heitzler, Jr. and from enforcing the order of the Supreme Court of September 8, 1972; and

(2) To dismiss the action filed by Judge Heitzler against the Justices of the Supreme Court of Ohio, No. C72-1140, for lack of venue.

We are aware, as the court was in *Holub*, *supra*, that the writ of mandamus is an extraordinary remedy "to be used reluctantly and only in exceptional cases." In this case we regard the circumstances to be both exceptional and extraordinary.

No. 72-2062

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HONORABLE C. WILLIAM O'NEILL,
Chief Justice of the Supreme Court
of Ohio, et al.,
Petitioners,

vs.

HONORABLE FRANK J. BATTISTI, Chief Judge
of the United States District Court for
the Northern District of Ohio,
Respondent.
George S. Heitzler, Jr.,
Intervenor.

ORDER

Filed
Nov. 13, 1972
James A. Higgins, Clerk

Before: PHILLIPS, Chief Judge, MILLER and LIVELY, Circuit Judges.

Upon consideration, IT IS ORDERED that the motion of Intervenor, George S. Heitzler, Jr., to stay the execution and enforcement of the order of this Court of November 10, 1972, granting a writ of mandamus, be and hereby is denied.

Entered by order of the Court.
JAMES A. HIGGINS, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

DANIEL T. TAYLOR, III, et al.,
Plaintiffs

v.

KENTUCKY STATE BAR ASSOCIATION,
et al., *Defendants*

Civil Action No. 6171

MEMORANDUM AND ORDER

Pursuant to the mandate of the Sixth Circuit Court of Appeals (C.A. No. 19718, March 26, 1970), this cause was remanded this Court for an evidentiary hearing, to determine whether or not the defendant Kentucky State Bar Association was motivated by "bad faith" in the institution of disbarment proceedings against the plaintiff, attorney Daniel T. Taylor, III. In the words of the Sixth Circuit:

> If the appellants can bear the "heavy burden" of showing that the Bar Association proceedings were instituted deliberately to suppress First Amendment rights, and if the appellants can overcome the strong presumption that the Bar Association's motive was to enforce its canons of ethics, then the District Court can frame an appropriate remedy against the Bar Association by enjoining further grievance proceedings and preventing the Bar Association from presenting any recommendations to the Court of Appeals of Kentucky. 424 F. 2d 478, 482.

The court reasoned that if such a burden could be met, if bad faith proceedings without hope of ultimate success, calculated only to harass, could be shown, then a federal injunction could issue under 42 U.S.C. §1983 and the doctrine of *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) in order to prevent a "chilling effect" upon the exercise of First Amendment rights by plaintiff Taylor and other Kentucky lawyers, who, like Taylor, are inclined to represent controversial clients.

Accordingly, plaintiff Taylor was granted a full evidentiary hearing in this court, which lasted from the

morning of July 6, 1971, until the evening of July 9, 1971. Some fifty (50) or more witnesses testified at said hearing, and extensive exhibits, including in camera transcripts of proceedings in other disciplinary matters, were filed. The Court has duly considered the transcript of that hearing (875 pages) and the briefs submitted by both parties.

A chronology of the K.S.B.A. disbarment proceedings can be stated fairly succinctly. In May of 1967, complaints about attorney Taylor began coming to the attention of the Bar Association Board of Governors. An investigation of said complaints by Mr. Henry Harned (Director of the Kentucky Bar Association) and members of his staff (Mr. Paul Mahoney and Mr. James Higgs) resulted in a nine (9) count charge being preferred against Taylor on July 29, 1968. The charge included neglect and abandonment of a client, assault and battery upon a fellow attorney, intimidation of a witness, the deceitful presentation of persons other than the actual defendant in court, and five more counts involving contempt of court in the Geary murder trial. Two months after the charge was filed, on September 20, 1968, the Board of Governors appointed a Trial Committee of three men (Pat Rankin, John Coleman, and Clyde Williams) to hear the charge in accord with rules of the Kentucky Court of Appeals. The Trial Committee held a three-day hearing at which all parties were represented by counsel and were granted the right to confront and cross-examine witnesses. The Trial Committee found plaintiff Taylor guilty on all nine (9) counts in a report to the Board of Governors and recommended a one-year suspension from practice. The Board of Governors subsequently, upon its con-

sideration of the Trial Committee report, dismissed (2) of the counts,[1] however still found Taylor "guilty" on the remaining (7), and increased the penalty recommended by the Trial Committee from a one to five-year suspension from the practice of law in Kentucky. Said penalty was then recommended by the Board of Governors in an advisory opinion to the Kentucky Court of Appeals,[2] which has not yet been acted upon by the Court.

In passing on the issue of the existence or non-existence of a "bad faith" prosecution, the role of a federal court is limited. Our function is not to weigh the evidence, nor to decide if attorney Taylor is, in fact, guilty of the charges; we rather must determine whether or not the record contains *any credible evidence* to support a finding of guilty. Only if the record is *totally devoid* of any such credible evidence to support a guilty verdict, can bad faith be presumed. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960-; *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969); *Cameron* v. *Johnson*, 390 U.S. 611 (1968). In Thompson (supra), the now-famous "Shuffling Sam" case, the Supreme Court fixed the boundaries of our inquiry to be:

> The ultimate question presented to us is whether the charges against petitioner were *so totally devoid of evidentiary support* as to render his conviction unconstitutional under the

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[1] Count 4 (accusing Judge Pound of disability from either medicine or alcohol); Count 6 (abandoned client).

[2] The Remand Order of the Sixth Circuit Court of Appeals incorrectly stated that "continuances, postponements and the initiation of this lawsuit have forestalled further action by the Trial Committee." 424 F.2d at p. 479.

> Due Process Clause of The Fourteenth Amendment. Decision of this question turns not on the sufficiency of the evidence but on whether this conviction rests on *any evidence at all.* 365 U.S. 199. (Emphasis added).

Only the total lack of evidentiary support for the finding of guilt can overcome the "strong presumption" that the sole motive of the defendant Bar Association was simply to enforce its canons of ethics, and thereby replace it with another presumption—that of "bad faith." Indeed, plaintiff Taylor bears a heavy burden of proof.

In an exhaustive sixty-page brief, plaintiff Taylor contends that there is a total lack of evidence to support a finding of guilty on any of the charges; that "bad faith" is also evident at all stages of the proceedings; and that the disciplinary actions were taken solely to harass plaintiff Taylor, i.e., punish him for representing controversial, unpopular clients and causes, and to deter other lawyers in Kentucky from practicing law in Taylor's fashion.

We cannot agree. A review of the record conclusively demonstrates credible evidence of a course and pattern of "unlawyerlike" and unprofessional conduct by attorney Taylor, which fully justifies the strong presumption that the defendant Bar Association was merely enforcing its own canons of ethics by which Taylor had agreed to abide when granted his license to practice law in Kentucky.

The evidence presented by plaintiff Taylor clearly failed to overcome the strong presumption of good faith. Although many witnesses testified that attor-

ney Taylor was an unorthodox, independent lawyer who devoted his practice almost exclusively to the representation of controversial, unpopular clients, *no casual link* between that (undisputed fact, and the disciplinary proceedings was ever shown. We are convinced that the defendant Bar Association disciplined plaintiff Taylor without regard to his clientele, and that like conduct in the defense of more "popular" clients would have resulted in the same disciplinary proceedings. The intent of the Bar Association was obviously to preserve the integrity of the legal profession, not to suppress Taylor's First Amendment freedoms.

Plaintiff's brief asserts that the "bad faith" of the defendant Bar Association becomes patent at four stages of the disciplinary proceedings; (1) Bias and incompetence in the investigation; (2) Denial of procedural due process at the hearing; (3) Bias in the actual voting by the Board of Governors; and (4) Unequal treatment as to the penalty imposed compared to prior cases. Each point must be analyzed separately.

Investigatory Stage

Plaintiff Taylor argues that the investigation prior to the filing of charges was the original and most blatant example of the "bad faith" prosecution, in that it was "grossly biased," "incompetent," and displayed the same "reckless disregard for truth" condemned by the Supreme Court in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967).

In support of these bold allegations, plaintiff submits that counts 6 through 9 were "secretly held in abeyance

over the plaintiff's head for over a year," and then hurriedly investigated and preferred to supplement counts 1-5 which arose out of Taylor's conduct at the Geary murder trial. Further, it is argued that the facts were not thoroughly checked, and no effort was made to obtain evidence favorable to the plaintiff. Nothing in the record is more pertinent on this score than the direct examination of Mr. Henry Harned, Director of the Kentucky Bar Association, by plaintiff's attorney, William Kunstler. Mr. Harned, who was in charge of the investigation of palintiff Taylor, repeatedly testified that the K.S.B.A. took no action on counts 6, 7, 8, and 9 for about one year, because, as a matter of standard operating procedure, they had been referred to the Louisville Bar Association for investigation:

> "Q: Then, why, Mr. Harned, didn't you present counts 6, 7, 8, and 9, all of which were more than a year old; why didn't you present those if they were so serious to the Board of Governors prior to May 8, 1968, when you asked for permission to investigate them fully?"
>
> "A: I explained that this morning. They were submitted to the Louisville Bar for investigation by their committee and they were under investigation by the Louisville Bar. p. 131.
>
> * * *
>
> "[T]hey do an excellent job investigating cases down here; that it would take us months and months to accomplish and they know the people and they know the events as they occur and they do a fine job of investigating and reporting back to my office and that's been going on for years." p. 132. *Transcript of Proceedings*, Volume IV, pp. 131, 132.

Moreover, the testimony of Mr. Harned reveals a reasonably thorough investigation on the part of the defendant K.S.B.A as well. In regard to the "fake defendant" charge (count No. 9), the following colloquy appears in the transcript:

> "Q: And isn't it a fact, Mr. Harned, that you singled out Mr. Taylor because you weren't concerned with Mr. Tucker; he wasn't the object of what you wanted to get; isn't that correct?"
>
> "A: Oh, I had no choice except to apply the facts to Mr. Taylor."
>
> "Q: But you could have applied them though, to Mr. Tucker, just as well, couldn't you?"
>
> "A: Only from the newspaper account."
>
> "Q: Well, what else did you have about Mr. Taylor other than the newspaper account?"
>
> "A: Uh, the testimony of Judge Colson, and Mr. Riggs and Mr. Brammell, Officer Brammell." *Transcript*, Volume IV, p. 97.

In an effort to find the truth about the events that took place on that day of great confusion in City Police Court, Mr. Harned interviewed the Judge (Colson), the prosecutor (Riggs), and the police witness (Brammell). These men certainly were in a good position to know the events that transpired; they were present.

The "abandoned client" charge (count No. 6) arose out of an affidavit by Mrs. Ruby Orbison, the sister of the client who was allegedly abandoned, followed by a statement obtained from attorney Sidney Baer who replaced Taylor after the order of withdrawal was eventually entered. (See *Transcript*, Volume IV, pp.

103, 107, 109). Both Mrs. Orbison and Mr. Baer were in a good position to know what transpired, and whether or not the client had been "abandoned"; they were present when the incident occurred.

Likewise, the charge of assault and battery (count No. 7) also arose out of a reasonably thorough investigation. Mr. Harned obtained the affidavit of Mr. John Tim McCall, the attorney who was physically attacked by attorney Taylor, and the statement of another attorney who was present when the incident occurred, Mr. Robert E. Fleming (who considered the conduct of attorney Taylor as "uncalled for and unbecoming a lawyer"), as expressed in Fleming's written communication to the Bar during its investigatory procedures.

Count No. 8, the "intimidation of a witness" (a female reporter), arose out of the same incident as the assault and battery charge, and was supported by the same investigation and evidence, (i.e., statements by attorneys McCall and Fleming).

Finally, counts 1-5 arose out of plaintiff Taylor's conduct at the Geary murder trial (April 29-May 3, 1968). Mr. Harned brought these charges only after an extensive interview with Judge J. Miles Pound (who held plaintiff Taylor in contempt of court), and after reviewing excerpts from the trial transcript, as well as numerous newspaper articles.

We find the nine counts of unethical conduct were brought against plaintiff Taylor only after a reasonably thorough investigation by the Louisville and Kentucky Bar Associations. There is no evidence herein to suggest that the Taylor investigation was any less competent or thorough than investigations of alleged unethical conduct by other attorneys in the past.

Finally, plaintiff contends that the investigatory staff failed to properly "verify"[3] the charges before formally preferring them to the Board of Governors. But such was not the case. The clear evidence in the record shows that each of the nine (9) counts were "verified" by affidavits, letters, or interviews, prior to July 19, 1968, when the Board of Governors authorized the filing of the 9-count charge. Counts 6-9 had been verified between May of 1967 and May 8, 1968. Counts 1-5 were verified (by an interview of Judge Pound) between May 8, 1968 (when the Geary murder trial ended) and July 19, 1968 (when the nine counts were filed). (See *Transcript of Proceedings*, Volume IV, p. 129).

We, therefore, conclude that no bias or incompetence existed in the investigation of plaintiff Taylor by the defendant Bar Association, and that said preliminary proceedings were conducted in good faith in an effort to uphold the canons of ethics.

Alleged Denial of Procedural Due Process at the Hearing

The second stage of the disciplinary proceedings at which plaintiff maintains "bad faith" existed was the "hearing stage." Plaintiff urges on brief that the refusal of the Trial Committee to allow a public hearing, their refusal to be examined as to bias, introduction of "editorialized excerpts" of the Geary trial, and the requirement that a guilty attorney pay all costs of disciplinary proceedings all constitute a denial of proce-

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[3]A term required to mean "substantiated" as opposed to "sworn to" as there is no legal requirement of a formal swearing by everyone to everything in an investigatory process.

ural due process and hence "bad faith" on the part of ıe defendant Bar Association.

Once again, there is no merit to plaintiff's allega-ons.

The Sixth Amendment of the United States Consti-ution and the Kentucky Bill of Rights do guarantee he right of a public trial to the accused "in all *crim-nal prosecutions*". U.S.C.A. Amend. 6 (Emphasis dded). Plaintiff Taylor, however, fails to cite any uthority whatsoever for the idea that disbarment pro-eedings are in the nature of a "criminal prosecution." Ve hold that they are not, and, hence, no right of "pub-ic trial" exists under the Sixth Amendment. Disbar-nent proceedings are, rather, sensitive disciplinary natters, which, as a matter of public policy, should be onducted in private, in order to encourage potential vitnesses to come forward as well as to protect the ccused attorney from unnecessary publicity resulting rom false or unproven assertions. A similar result vas reached by a New York Federal Court in 1953, in *American Broadcasting Company* v. *United States*, 110 F. Supp. 374 (1953) in which the Sixth Amendment ight to a public trial was held inapplicable to Federal Communications Commission license revocation pro-eedings. Said the court:

> "A finding by the F.C.C. that its rules had been transgressed would not amount to a conviction for a crime (citing cases) nor would the denial of a license to an applicant be punishment for a crime." 110 F. Supp. 374, 390.

We can detect no difference between the revocation of a license to operate a radio or TV station due to violation of F.C.C. Rules, (as in *A.B.C.*), and the suspen-

sion of a license to practice law due to the violation of the Bar Association canons of ethics (as in the case at bar). Neither proceeding is in the nature of a "criminal prosecution," and thus neither requires a public trial under the Sixth Amendment.

Likewise, disbarment proceedings are not the "criminal trials" covered by the *Sizemore* "conflict of interest" rule. In *Asher* v. *Mills*, 421 S.W.2d 79, the Kentucky Court of Appeals stated that rule quite clearly:

> "This court has long since decided in *Wagers* v. *Sizemore*, 300 S.W. 918, and *Roberts* v. *Noel*, 296 S.W.2d 745, that a decision whereby the decision-maker *in a criminal case* is paid only if the defendant is found guilty violates the Fourteenth Amendment to the United States Constitution." 421 S.W.2d 79, (Emphasis added).

Plaintiff argues that R.C.A. 3.460 is unconstitutional because the Bar Association is only reimbursed for its costs incurred in the disciplinary proceedings if the accused attorney is found guilty and then required to pay the costs incurred; maintaining such a rule allegedly creates a pecuniary conflict of interest. The cases cited by the plaintiff, however, (*Sizemore*, *Asher*, *supra*, and *Roberts* v. *Nall*, 296 S.W.2d 247 (1936)) are all distinguishable, because all involved *criminal trials*, in which either the judge or jury had a direct *personal* financial stake in the outcome of the trial. In the case at bar, we have no "criminal trial," and the triers of fact (K.S.B.A. Trial Committee and Board of Governors) have no direct *personal* financial stake in the outcome. Only the defendant K.S.B.A. itself must incur expenses for which it may be reimbursed (i.e., the K.S.B.A. Treasury); the individual members

of the Trial Committee and Board of Governors are not required to expend personal funds for which they might hope to be reimbursed. Thus, plaintiff Taylor was not deprived of procedural due process by operation of R.C.A. 3.460.

Neither do we see a denial of due process in the introduction of certain excerpts from the Geary murder trial rather than the entire transcript. Plaintiff cites no case law authority to support said contention, and the rule cited, R.C.A. 3.380, is inapplicable. The *relevant rule*, R.C.A. 3.360, states that

* * *

> "Where, in any proceeding, evidence has been taken under oath, upon due notice to the Respondent, and at the taking of which Respondent has appeared, either in person, or by counsel, or as an attorney for any party, a duly certified transcript *of all, or the essential portions of* such proceedings may be used as evidence in any hearing provided for in R.C.A. 3.200 (Trial Committee Hearing) or in any investigation antecedent to or in connection with any disciplinary case involving the same charge growing out of matters connected therewith and such transcript and records, *or parts thereof* may be made a part of the record on any hearing or investigation." (Emphasis added).

The Rules of the Kentucky Court of Appeals thus clearly allow the introduction of excerpts and portions of transcripts of other proceedings which are relevant to the disbarment proceedings. Plaintiff Taylor fails to cite any authority for the assertion that such a rule is violative of due process of law, and the thought that the excerpts may have been "editorialized" by the court

reporter is mere conjecture and wholly without evidentiary support.

Finally, no denial of due process is seen in the refusal of the defendant Trial Committee to allow themselves to be examined as to possible bias on their part.

Plaintiff argues that under the rule of *Osborne* v. *Bullitt County Board of Education*, 415 S.W.2d 607, (1967), the dual role of the defendant K.S.B.A. required such an examination. But *Osborne* does not apply. There, the School Board constituted the last step in the administrative process; herein, the Kentucky Court of Appeals is the final judge of the fairness of the disbarment proceedings by the Trial Committee and Board of Governors. As the last rung in the administrative ladder, the Court of Appeals is charged with the discovery of any possible bias, or caprice along the line. Moreover, the Rules of the Court of Appeals make no provision for the examination of Trial Committee members for possible bias.

The hearing stage is also attacked by plaintiff Taylor in the allegation that the Trial Committee Report contains no credible evidence to support any of the nine counts of unethical conduct lodged against him.

Counts 1-5 (contempt of court in the Geary murder trial) should all be totally excused, it is submitted, because the judge involved was under the influence of alcohol during the trial.[4]

No one can read the Geary trial excerpts without rejecting such an argument. Attorney Taylor did not

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[4]A charge never proven conclusively.

even put the matter of Judge Pounds' physical condition into issue until the afternoon of May 3, 1968, the last full day of testimony. All of the other contempt incidents occurred prior in time to the allegation that Judge Pound was under some physical disability and were wholly unrelated to said alleged condition.

Even the most cursory reading of the Geary trial proceedings reveals a pattern of conduct by attorney Taylor that can only be characterized as contemptuous and reprehensible. We could easily cite numerous portions of the Geary transcript to prove our point, but we decline to do so. Our function here is not to try the merits of this case, or to determine the guilt or innocence of attorney Taylor; our function is to simply determine if credible evidence exists in the record to support a finding of guilt. Suffice it to say we find credible evidence in the Geary transcript *more than sufficient* to justify a guilty verdict on counts 1, 2, 3, and 5 of the Taylor charge.

Likewise, a guilty verdict on counts 7, 8, and 9 are also supported by substantial credible evidence. (See *Transcript of Proceedings*, Volume II, pp. 61-73, Volume IV, pp. 79, 80, 95).

In reference to the "fake defendant charge" (count 9), although Police Judge Colson saw no fraud *at the time* (*Transcript of Proceedings*, Volume I, p. 68) in that he was aware of no legal rule against testing the identification of defendant by police, such a practice constitutes the perpetuation of a fraud upon a court in violation of canon seven of the Canons of Ethics of the American Bar Association.

Reiterating that we leave the merits of this case to the Kentucky Court of Appeals, we conclude that, as

a matter of law, substantial credible evidence exists in the record to support a finding of guilty by the defendant K.S.B.A. Board of Governors on counts 1, 2, 3, 5, 7, 8, and 9 of the 9-count charge.

Consequently, we find no denial of due process, bias or bad faith in the hearing stage of the Taylor proceedings.

Alleged Bias in the Voting by Board of Governors

The substance of this point is that four (4) members of the Board of Governors who *did not vote* on plaintiff Taylor's guilt or innocence on March 20, 1970, *did vote* on punishment the next day, March 21, 1970.

Although such a procedure may be somewhat unusual, legitimate reasons explain the occurrence. According to the record, two of the men involved, Mr. Allen Schmitt and Mr. E. Gaines Davis, were members of the Kentucky General Assembly at the time and were appearing that afternoon before some legislative committee (the day of the vote on guilt or innocence). Two others, Anthony Hellmann and Lloyd Cardwell, abstained from voting on guilt or innocence because they were members of the Louisville Bar Association, and were so "close" to the case. (See *Transcript of Proceedings*, Volume IV, pp. 146, 147).

Thus, each of the four men involved had a legitimate reason for not voting on plaintiff Taylor's guilt or innocence and then voting on the punishment the next day. Certainly, the failure to vote on guilt or innocence was no waiver of the right to vote on penalty.

Moreover, the votes of the four Board members involved had no effect on either the find of guilt or the

penalty recommended. The findings of guilt were by clear majorities on seven counts of the 9-count charge. The penalty vote resulted in eleven (11) votes for a 5-year suspension, two (2) votes for total disbarment, and one (1) vote for a 2-year suspension. Even if the four Board members referred to *did not vote at all*, nine (9) votes for *at least a five-year suspension* would remain, constituting a majority of the seventeen (17) Board members eligible to vote.[5]

Indeed, every member of the Board of Governors, save one, voted for *at least* a five-year suspension. (See *Tally Sheet*, plaintiff's Exhibit 9).

Contrary to showing bias, the voting of the Board of Governors reveals careful thought and independent judgment. Although the Trial Committee found plaintiff Taylor guilty on all nine(9) counts of the charge, the Board of Governors found plaintiff "not guilty" on count No. 4 (accusing Judge Pound of drunkenness in court) and count No. 6 (the abandonment of a client).

Credible evidence is thus evident in the record to support that the voting of the Board of Governors was conducted in good faith, and no evidence of the plaintiff rebuts this presumption of regularity.

Penalty Stage

Plaintiff's final argument is that the 5-year suspension recommended by the defendant K.S.B.A. is an

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[5]"R.C.A. 3.390: * * * Both the finding of guilt and the disciplinary action to be recommended must be agreed upon by a majority of the members of the Board entitled to vote in disciplinary proceedings."

unduly harsh penalty which denies him equal protection and again shows bias and bad faith.

Again, we cannot agree. The submitted *in camera* case[6] is not analogous to the case at bar in any sense of the word. There, an attorney was investigated on a single charge (i.e., destruction of evidence) growing out of a single event; whereas, nine (9) charges were lodged against attorney Taylor, growing out of numerous incidents over a period of time.

Plaintiff also cites numerous Kentucky cases which allegedly resulted in more lenient penalties for an equal quantum of guilt.

The Court has read and analyzed all of the cited cases,[7] and we find none of them in point. While we do not feel compelled to distinguish each of the cases and all of their factual nuances, we conclude generally that none of the cited cases involved the pattern of conduct over a period of time resulting in nine charges. Rather, the cited cases dealt with fewer, usually less serious charges flowing from a single incident.

Again we hasten to add that the Kentucky Court of Appeals is the final arbiter in these disciplinary proceedings; they will make the final decision on the fairness of the recommended 5-year suspension. We can detect no unequal treatment, bias or bad faith in that recommendation.

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[6]By order of this Court, identification of the in camera case, or its parties, is prohibited.

[7]*In Re Lewis*, 282 S.W.2d 321; *In Re Gordon*, 402 S.W.2d 854; *In Re Allen*, 212 S.W.2d 328; *In Re Vaughn*, 369 S.W.2d 14; *In Re Bentley*, 201 S.W.2d 712; *In Re Cohen*, 187 S.W.2d 833; *In Re Carroll*, 406 S.W.2d 845.

Conclusion

Plaintiff urges that we look to the "totality of circumstances"[8] to determine whether or not the defendant K.S.B.A. conducted "bad faith" disbarment proceedings, designed deliberately and solely to suppress his First Amendment rights. This, we certainly have done. And, a careful analysis of the record (1,000 pages of Trial Committee Proceedings, 800 pages of Proceedings of the Evidentiary Hearing before this Court, Briefs and Exhibits) leads us to the inescapable conclusion that there is substantial credible evidence to support the finding of guilty by the defendant K.S.B.A., and that the sole motive of the defendant was to enforce its own canons of ethics, so vital to the integrity of the legal profession. Plaintiff Taylor's allegations of bias and bad faith at the investigation, hearing, voting and penalty stages of the proceedings are unfounded and unsupported by the evidence and fail to overcome the strong presumption of regularity and good faith on the part of the defendant Kentucky State Bar Association.

After pretrial, trial, briefing, and submission of this action following its remand to us by the Sixth Circuit; in fact, as late as January 2, 1972, when we were actually engaged in preparing this Finding, the plaintiff Taylor tendered to us a supplemental complaint, seeking thereby to add a new plaintiff (one Tinsley) and a new defendant in the person of Judge John P. Hayes of the Jefferson Circuit Court. The allegations of the tendered document have nothing whatsoever to do with the controversy here tried, briefed, and sub-

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[8] *Sobel* v. *Perez*, 289 F.Supp. 392 (E.D. La. 1968).

mitted; stemming rather from a performance by the plaintiff Taylor and the punishment he received therefor following a criminal proceeding in the Jefferson Circuit Court, arising long after our trial of the instant action. Those allegations are in and of themselves, if they be anything, a separate and distinct matter, not related in time, substance, or identity to the issues now before us. The motion to file such supplemental complaint is OVERRULED. *U. S.* v. *South Pacific Co.*, 75 Fed. Supp. 336.

WHEREFORE, the plaintiff's action is dismissed at plaintiff's costs, and the Kentucky State Bar Association is accordingly hereby relieved of its self-imposed inhibitions against further proceedings to disciplne Daniel T. Taylor, III.

January 14, 1972

JAMES F. GORDON
United States District Judge

Copies to:
Counsel of record

Entered
Jan. 14, 1972

BARBARA D. SPAIN
Deputy Clerk
August....., Clerk

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In the Supreme Court of the United States

October Term, 1972

No. 72-1091

GEORGE S. HEITZLER, JR.,
Petitioner,

vs.

C. WILLIAM O'NEILL, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUGGESTION OF MOOTNESS AND BRIEF IN OPPOSITION OF RESPONDENT JUSTICES OF THE OHIO SUPREME COURT

VICTOR E. DEMARCO
PATRICK F. MCCARTAN
ROBERT J. HOERNER
MARC L. SWARTZBAUGH
1750 Union Commerce Building
Cleveland, Ohio 44115
(216) 696-3939
Special Counsel for Respondent Justices of the Ohio Supreme Court

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported in 33 Ohio Misc. 137 (Vol. XLVI, No. 3 of the *Ohio Bar*, dated February 19, 1973).

RELEVANT STATUTORY PROVISIONS

Certain statutory provisions are relevant in addition to those cited by petitioners. The following sections of Title 28 of the United States Code are relevant:

> § 1391. (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

> § 1651. (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The following sections of the Ohio Revised Code are also relevant:

> § 2503.10 The clerk of the supreme court shall keep his office at Columbus, in the rooms provided for that purpose. He shall be furnished by the state with all necessary printing, books, blanks, stationery, and furniture.
>
> §2503.32 The records and papers pertaining to the business of the supreme court shall be kept in the rooms provided for the court. They shall not be removed therefrom unless by direction of the court, and then only so long as its business requires.
>
> §2503.33 The chief justice and the judges of the supreme court shall meet at Columbus on the first Tuesday after the first Monday of January of each year to hold a term of court.

QUESTIONS PRESENTED

The first question sought to be raised by petitioner is not presented on the record. Accordingly, the first question must be rephrased as follows:

> 1. Did the Court of Appeals properly enter an order under 28 U.S.C. § 1651 directing the District Court to vacate its temporary restraining order, entered without hearing and without notice, which prevented the Ohio Supreme Court "from taking any further action in disciplinary proceedings against" petitioner which were then pending before it?

COUNTERSTATEMENT OF CASE

Respondent Justices of the Ohio Supreme Court present the following facts in addition to those set out by the Petitioner in his Statement of the Case:

Following the filing with the Ohio Supreme Court on September 1, 1972 of the recommendations of the Board of Grievances and Discipline, the Supreme Court set the matter for hearing on October 10. At the request of petitioner, the hearing date was continued to November 15, 1972.

After Judge Peck entered his Stay of the District Court's Temporary Restraining Order on October 27 (Pet. 10), petitioner filed a far-ranging brief of 35 pages in support of a motion to dissolve that stay which, in addition, expansively canvassed the merits of respondents' mandamus petition. Accordingly, while the Sixth Circuit's Order of November 10 was prior to the date it had originally scheduled for hearing on the petition, the Order was entered only after it had had an opportunity to review petitioner's extensive brief.

The Order actually entered by the Sixth Circuit on November 10 appears at Pet. App. A-46, A-47 and for convenience is quoted here in full:

> "The United States District Court for the Northern District of Ohio is directed:
>
> "(1) To vacate and withdraw the temporary restraining order of October 25, 1972, enjoining the Ohio Supreme Court from taking any further action in disciplinary proceedings against Judge George S. Heitzler, Jr. and from enforcing the order of the Supreme Court of September 8, 1972; and

"(2) To dismiss the action filed by Judge Heitzler against the Justices of the Supreme Court of Ohio, No. C72-1140, for lack of venue."

It is important to note, in view of the first question sought to be presented by petitioner, that dismissal of the action was directed solely on the grounds of lack of venue. The only order resulting from application of the abstention doctrine and federal principles was the direction that the lower court's temporary restraining order preventing the Ohio Supreme Court from taking further action be vacated.

Following the Sixth Circuit's entry of its November 10 Order, the Ohio Supreme Court did go forward with the scheduled November 15th hearing in petitioner's disciplinary proceeding and, on December 15, 1972, issued a 19 page opinion confirming the recommendations of the Board and ordering petitioner indefinitely suspended from the practice of law. That opinion, *Cincinnati Bar Association v. Heitzler,* appears in 32 Ohio St. 2d at 214 and is set out as an appendix to this brief. When that opinion is compared with petitioner's federal court complaint (Pet. App. A-1 - A-29), it becomes clear that petitioner raised before the Ohio Supreme Court, and that the Ohio Supreme Court considered, essentially all of the issues underlying his 42 U.S.C. § 1983 federal complaint.

Petitioner thereafter asked the Ohio Supreme Court for a stay of its order, which was denied on January 12, 1973, pending the filing of a petition for a writ of certiorari in this Court, so it is to be presumed that on or before its March 15, 1973 due date petitioner will file such a petition with this Court asking for direct review of the Ohio Supreme Court's December 15 decision. Petitioner is thus, by this petition, in the anomalous position of seeking to obtain collateral review of his claims before he has sought direct review of them.

ARGUMENT

1. The first question sought to be presented by petitioner is moot and, in any event, was correctly decided under settled principles.

In his first question, petitioner attempts to raise the issue whether the Sixth Circuit improperly divested the court below "of its lawful and proper jurisdiction already assumed in a federal civil rights suit." But the only "jurisdiction," lawful, proper, assumed or otherwise, of which the Sixth Circuit divested the District Court, was its "jurisdiction" to enforce "the temporary restraining order of October 25, 1972," entered without notice or hearing, "enjoining the Ohio Supreme Court from taking any further action in disciplinary proceedings against Judge George S. Heitzler, Jr." But there is now no further action for the Ohio Supreme Court to take. It has completed its action with respect to the disciplinary proceedings against petitioner. It has handed down its final judgment confirming the recommendations of the Board and ordering petitioner indefinitely suspended from the practice of law. There is nothing more for it to do. Accordingly, the first question sought to be presented is moot.

In any event, paragraph one of the Sixth Circuit's November 10 Order was clearly in accordance with applicable law and usages approved by this Court. This Court has recently emphasized "the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Mitchum v. Foster*, 407 U.S. 225, 243 (1972). Petitioner's anemic claim below that the Board's charges infringed his freedom of association in choosing his luncheon companions (Pet. App. A-17), which is the only factual allegation made in the complaint of interference with First Amendment freedoms, was certainly

inadequate to invoke the narrow exception of *Dombroski v. Pfister,* 380 U.S. 479 (1965), as further explicated in *Younger v. Harris,* 401 U.S. 37 (1971), which decisions are applicable because of the "quasi-criminal" character of bar disciplinary proceedings. *In re Ruffalo,* 390 U.S. 544, 551 (1968). Such an allegation, at most, suggests an incidental "restriction of plaintiff's business and social activities," which is not the sort of irreparable injury to vital First Amendment freedoms which permits federal intervention. *Shaw v. Garrison,* 293 F. Supp. 937, 950 (E.D. La.), *aff'd per curiam* 393 U.S. 220 (1968).

There was no absence of "an opportunity to raise his constitutional claims" in state court, *Younger v. Harris, supra,* 401 U.S. at 49, for they not only could have been, but were, raised in the Ohio Supreme Court, and will almost certainly be raised here on a petition for direct review of the Ohio Supreme Court's decision. Nor were there any allegations that the proceedings against petitioner were brought "with no intention of pressing the charges or with no expectation of obtaining" relief, *Cameron v. Johnson,* 390 U.S. 611, 619 (1968); indeed, the fact that petitioner was indefinitely suspended from the practice of law shows that the proceedings against him were not pretensive or frivolous but were brought in good faith to achieve relief authorized in such proceedings. No conflict of circuits is alleged, and petitioner's strained attempt (Pet. 26) to distinguish *Erdmann v. Stevens,* 458 F.2d 1205 (2d Cir.), *cert. denied,* 93 S. Ct. 126 (1972) indicates that the Second Circuit is fully in accord with the Sixth Circuit on the issue presented.

Surely a state's concern with the integrity of its bar is as subject to deference by the federal judiciary as were the oil and gas regulatory policies which counseled federal abstention in favor of state court decision in *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943).

Mandamus was a proper remedy, not only as "the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations," *Will v. United States*, 389 U.S. 90, 95 (1967), but also as a wise and necessary exercise by the Sixth Circuit of its supervisory control over the district courts within its jurisdiction, *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957). The writ issued by the Sixth Circuit was fully consonant with and required by this Court's decisions counselling respect for state court proceedings in sensitive areas of federal-state relations.

2. The Sixth Circuit's decision ordering the complaint below dismissed for improper venue was a routine application of settled law, presenting no question of importance for this Court.

The Sixth Circuit ordered that the complaint be dismissed because venue was improper under 28 U.S.C. § 1391(b). It first held that the official residence of the Justices of the Ohio Supreme Court was Columbus, Ohio, in the Southern District of Ohio. This decision was clearly correct in light of O.R.C. §§ 2503.10, 2503.32, 2503.33 (p. 2, *supra*) and 2503.34 (Pet. 4), but whether it was or was not correct, this Court has many times said that it does not sit to pass judgment on the resolution of state law questions by the Circuit within whose jurisdiction the state is located. E.g., *Estate of Spiegel v. Commissioner*, 335 U.S. 701, 707-08 (1949). Since for federal venue purposes, the official residence of all defendants was solely in the Southern District, and since they were manifestly sued in their official capacity, the Sixth Circuit quite correctly and routinely held that venue was improper in the Northern District of Ohio under 28 U.S.C. § 1391(b), and that 28 U.S.C. § 1392(a) had no application.

Accord, e.g., *United Office & Professional Workers v. Smiley,* 75 F. Supp. 695, 699 (E.D. Pa. 1946). In any event, *all* respondents could have been reached in a single action in the Southern District. The cases hold that § 1392 (a) has no application in such circumstances. *Hawks v. Maryland & Penn. R. Co.,* 90 F. Supp. 284 (E.D. Pa. 1950), *followed, Johnson v. B. G. Coon Construction Co,* 195 F. Supp. 197 (E.D. Pa. 1960).

The District Court, in issuing its *ex parte* temporary restraining order, had flagrantly disregarded applicable federal principles. This precipitous and improvident action had created circumstances which were "both exceptional and extraordinary" (Pet. App. A-47). The Court of Appeals, which had the case before it and was therefore required to issue some extraordinary relief, properly also took action in respect of the lack of venue, since any further proceedings in the United States District Court for the Northern District would have been a nullity. As the Court of Appeals indicated, there was precedent for this use of the All Writs Act. *Holub Industries, Inc. v. Wyche,* 290 F.2d 852 (4th Cir. 1961). Since petitioner's residence was in the Southern District as was the official residence of all respondents, and since no statute of limitations problems were present, the Sixth Circuit acted within its discretion in ordering dismissal rather than transfer under 28 U.S.C. § 1406(a). See, e.g., *Optico Corp. v. Standard Tool Co.,* 285 F. Supp. 46, 50 at note 4 (E.D. Pa. 1968).

CONCLUSION

The first question sought to be presented is moot. The decision below correctly applied settled principles and no conflict of circuits or other reasons exist which occasion intervention by this Court. It will be time enough to consider whatever validity, if any, petitioner's underlying constitutional claims may have when he seeks direct review of the Ohio Supreme Court's December 15 decision ordering him indefinitely suspended. The present petition should be denied.

Respectfully submitted,

VICTOR E. DEMARCO
PATRICK F. MCCARTAN
ROBERT J. HOERNER
MARC L. SWARTZBAUGH
1750 Union Commerce Building
Cleveland, Ohio 44115
(216) 696-3939
Special Counsel for Respondent Justices of the Ohio Supreme Court

APPENDIX

Opinion of the Supreme Court of Ohio in the Case of Cincinnati Bar Association v. Heitzler

[Cite as Cincinnati Bar Assn. v. Heitzler (1972), 32 Ohio St. 2d 214.]

[214]

Attorneys at law—Misconduct—Disciplinary action—Indefinite suspension from practice of law—Acts warranting.

(D. D. No. 72-3—Decided December 15, 1972.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

Respondent, an attorney at law duly admitted to practice in Ohio, was appointed Judge of the Cincinnati Municipal Court on February 15, 1963, which office he continued to hold until after being unsuccessful in the ensuing election. Respondent was again appointed Judge of the Cincinnati Municipal Court on March 23, 1964, was thereafter elected and re-elected. He continued to hold said office until January 5, 1969. At that time he assumed, by election, the office of Judge of the Court of Common Pleas of Hamilton County, Division of Domestic Relations.

[215] On August 16, 1971, the Cincinnati Bar Association filed a complaint with the Board of Commissioners on Grievances and Discipline, charging respondent with violations of the Canons of Judicial Ethics. On October 4, 1971, the bar association filed a supplemental complaint, charging respondent, through his counsel, with attempting improperly to influence the course of the disciplinary proceedings.

On December 16, 1971, the matter was heard before a panel of three members of the Board of Commissioners. The hearing consumed six days over an extended period of time, ending on January 7, 1972, during which the panel heard by testimony or stipulation, more than fifty witnesses, and received forty-seven documents in evidence. On August 4, 1972, the panel submitted its findings of fact and recommendations to the secretary of the Board of Commissioners, which findings and recommendations were thereupon reviewed and adopted by the Board of Commissioners, and were filed with this court on September 1, 1972.

The complaint of relator set forth eleven counts of alleged violations of the Canons of Judicial Ethics. Respondent's answer admitted many of the factual allegations of the complaint, but denied any misconduct or any violation of the Canons of Judicial Ethics.

The first count alleged that while respondent was separated from his first wife, from the latter part of 1969 until September 1970, one Carol Chasteen (now respondent's second wife) was present frequently in his apartment, and that their conduct "was such as to cause members of the apartment complex and others to believe that they were living together." Respondent contended that he employed Miss Chasteen "as an attendant for respondent's afflicted son" and that he "did not violate any judicial canon and did not live with the said, Carol Chasteen," but he did not specifically deny that their conduct was such as to give the impression alleged. Respondent was separated from his first wife in early 1969, and executed a separation agreement **[216]** with her in January, 1970. She obtained a Mexican divorce from him in October, 1970, and respondent and Miss Chasteen were married in November, 1970, both occurring subsequent to respondent's

voluntary appearance before a committee of relator to testify concerning his personal conduct. The board found that the evidence sustained the allegations of this count.

The second count alleged that respondent took an Ohio Bar Association trip to Majorca, Spain, in October 1969, accompanied by Miss Carol Chasteen, at his expense, and that during that trip his conduct "was offensive to other members of the Ohio Bar Association and their wives." Respondent admitted making the trip to Majorca, but denied engaging in any offensive conduct during the trip, and denied violating any canon of judicial ethics in connection therewith. The board, although finding evidence of questionable conduct, found the evidence to be "equally balanced as to whether respondent's conduct was excessive for such an outing or essentially different from that of the ordinary person" and thus found that the evidence did not support a finding against respondent upon this count.

The third count alleged that respondent also took two trips to Mexico with Miss Chasteen, which was admitted by respondent, but he denied engaging in any course of offensive conduct. This count was dismissed by the panel.

The fourth count alleged that respondent, while a judge, was observed in a downtown Cincinnati hotel in a state of intoxication, and conducting himself in a loud and offensive manner. Respondent, while admitting to having been at the hotel on occasion, denied ever conducting himself in a loud or offensive manner, or that he ever conducted himself "in any manner, save and except, that in keeping with his elected position." The board found that the evidence "fell far short" of sustaining the allegations of this count.

The fifth count alleged that respondent engaged in immoral conduct at a downtown Cincinnati hotel, which

was denied by respondent, who demanded "strict proof thereof." **[217]** The board found the evidence insufficient to sustain the allegations of this count.

The sixth count, which alleged impropriety by respondent in connection with his first wife's obtaining the Mexican divorce, was dismissed by the panel.

The seventh count, which alleged that respondent's personal financial investments in Harmony Loan Company, a Kentucky corporation, were in direct circumvention of Kentucky law, was dismissed by the panel for lack of sufficient evidence.

The eighth count alleged that respondent was guilty of misconduct in connection with his association with the Harmony Loan Company and its officers and directors. Respondent admitted the factual allegations of this count, but specifically denied that he violated any canon of judicial ethics in connection therewith. The board made a finding of misconduct in connection with this charge.

The ninth count alleged that respondent, while a judge of the Cincinnati Municipal Court, and a director of Harmony Loan Company, signed 487 orders in 357 cases wherein Harmony Loan Company was a party. Respondent denied this count "for want of knowledge," and contended that the count could not be considered for the reason that the acts involved did not occur within respondent's current term of office. At the hearing, respondent admitted signing numerous orders in cases brought by Harmony Loan Company while he was both a judge and a director of that corporation, but contended that these involved only default judgments, confessions of judgment, garnishments and motions, that they did not involve any contested matters, and that they were only ministerial acts. The board made a finding of misconduct in connection with this count.

The tenth count alleged misconduct by respondent in hiring as a constable a man with a lengthy criminal record, who was subsequently discharged because of alleged bribery attempts on his part. Respondent admitted hiring the employee knowing of his criminal record and discharging him [218] under the circumstances alleged, but contended that the employee was "in a menial, non-sensitive position" and that he was hired and retained "for many reasons other than political." The board made a finding of misconduct in connection with this count.

The eleventh count alleged that respondent hired his son and daughter to work in the Court of Domestic Relations. Respondent admitted these allegations, but denied any misconduct or violation of the Canons of Judicial Ethics in connection therewith. The board concluded that, although "such employment may technically amount to nepotism, the board believes that such employment did not amount to an intentional exploitation of nepotism."

The Board dismissed the supplemental complaint, finding that the evidence failed to establish "that respondent directed the actions of his counsel which led to the filing of the supplemental complaint."

The board found respondent to have violated Canons 4, 12, 13, 25, 26, 29, 33 and 34 of the Canons of Judicial Ethics adopted by this court, concluded "that respondent over an extended period of time has displayed continuing indifference to the Canons of Judicial Ethics, 'as a proper guide and reminder for judges,'" and recommended that respondent be suspended for an indefinite period from the practice of law.

The respondent not only filed objections to the findings and recommendations of the Board of Commissioners on Grievances and Discipline, but also filed a motion to quash and dismiss those findings and recommendations,

and to dismiss and recuse each and every member of the board.

Following the filing of the findings of fact and recommendations by the Board of Commissioners on Grievances and Discipline, this court authorized and directed the Chief Justice to order respondent to hear no further cases or other matters and to perform no other judicial duties until a decision is rendered in this matter. (*Cincinnati Bar Assn. v. Heitzler* [1972], 31 Ohio St. 2d 187.)

The cause is now before this court for consideration **[219]** of the report of the board and the objections and motions of the respondent.

Mr. R. O. Klausmeyer, Mr. John J. Getgey and *Mr. C. Donald Heile,* for relator.

Mr. Stanley E. Preiser, Mr. John B. Carrico and *Mr. David C. McCue,* for respondent.

Per Curiam. Respondent alleges that his constitutional rights were violated and he was denied due process of law by the Board of Commissioners on Grievances and Discipline, contending that his counsel was denied the right to file a brief on the merits with the hearing panel; that a witness for relator and a member of the board sat with the board when they discussed this case and made their findings and recommendations; that he was denied the right to be heard by the board; that the board made its findings and recommendations without "an indepth review of the transcript of testimony and the exhibits"; that three members of the board had heard evidence against respondent in another proceeding; and that the board proceeded under Gov. R. V rather than Gov. R. VI.

A review of the record indicates that the proceedings of both the board and the hearing panel were conducted in accordance with Rule V of the Rules For The Government

Of The Bar Of Ohio (formerly Rule XVIII of the Rules Of Practice).

While there was some confusion as to the time for filing briefs with the hearing panel, respondent was not prejudiced in this regard. The hearing panel and the board determined the matter prior to the actual filing of briefs by either relator or respondent. Furthermore, Gov. R. V confers no right upon either relator or respondent to file briefs before either the hearing panel or the board, and the filing of same is a matter within the discretion of the board or hearing panel. Respondent was given every opportunity to present any relevant evidence that he desired to present to the hearing panel.

[220] Although a member of the board was a witness for the relator, the minutes of the board clearly indicate that such member "took no part in the discussion or voting" in the case.

Respondent was given a full and complete hearing before the hearing panel. Gov. R. V does not provide for an additional hearing before the entire board where the matter has been heard by a hearing panel. Neither does that rule, nor due process, require that each member of the board make "an indepth review of the transcript of testimony and the exhibits." The fact that three members of the board may have heard evidence against respondent in another proceeding does not disqualify them as members of the board. There is no indication that the findings and recommendations of the board herein were not predicated upon the complaint of relator, the answer of respondent, and the testimony and exhibits received in evidence before the hearing panel. Furthermore, there could be no prejudice to respondent in any event, since the action of the board was unanimous.

In addition, it is this court and not the board that makes the ultimate conclusion, both as to the facts and as to the action, if any, that should be taken. As stated in *Mahoning County Bar Assn. v. Ruffalo* (1964), 176 Ohio St. 263:

> "In cases of this kind, the board of commissioners acts for and on behalf of this court. In doing so, it makes recommendations as to the facts which should be found and the action which should be taken by this court. However, this court has full responsibility for determining what the facts are and what action should be taken on those facts."

That both the hearing panel and the board afforded respondent a fair consideration and determination of the issues is shown by their action with regard to Counts 2, 3, and 11 of the complaint. The evidence clearly is sufficient to support a finding of misconduct with respect to all three counts. Yet, the hearing panel dismissed Count 3, and both **[221]** the hearing panel and the board found the evidence to be insufficient to support a finding of misconduct with regard to Counts 2 and 11.

Canon 4 of the Canons of Judicial Ethics requires that a judge's personal behavior in his everyday life "should be beyond reproach." Respondent admitted that he, while still married to, but separated from, his first wife, took his "girl friend" (now his second wife) with him, at his expense, on the trip to Majorca and on the two trips to Mexico, but he testified that they did not occupy the same room on any of the trips. Such conduct is not behavior beyond reproach within the meaning of Canon 4. Furthermore, the evidence permitted a finding of other offensive conduct by respondent during the Majorca trip. The board, while finding evidence of such conduct, found it to be "equally balanced, as to whether respondent's conduct was

excessive" or "essentially different from that of the ordinary person, including members of the judiciary, under similar circumstances." However, a judge is charged with the responsibility of conforming to a higher standard of personal behavior than the ordinary person. A judge's conduct of personal behavior must be "beyond reproach." Improper conduct which may be overlooked when committed by the ordinary person, or even a lawyer, cannot be overlooked when committed by a judge. By accepting his office, a judge undertakes to conduct himself in both his official and personal behavior in accordance with the highest standard that society can expect. As stated in Canon 34, "In every particular his conduct should be above reproach."

Respondent also admitted employing both his son and his daughter as charged by Count 11. Canon 12 provides that a judge should "avoid nepotism and undue favoritism in his appointments." The board, although finding this to be technically nepotism, found that it "did not amount to an intentional exploitation of nepotism."

Respondent contends further that the board should have proceeded pursuant to Gov. R. VI, rather than Gov. [222] R. V. Gov. R. VI relates to proceedings for removal of judges, whereas Gov. R. V. relates to the disciplining of members of the legal profession of Ohio. They are not mutually exclusive. A member of the legal profession, who is also a judge, may engage in misconduct which not only requires his removal from office, but also requires that disciplinary action be taken against him with regard to his right to practice law after such removal from office. Gov. R. V expressly provides that disciplinary action may be instituted against a member of the legal profession for violation of the Canons of Judicial Ethics while such member of the legal profession holds the office of judge.

This court previously considered the matter and held, in paragraphs five and six of the syllabus of *Mahoning County Bar Assn. v. Franko* (1958), 168 Ohio St. 17, that:

> "5. Judges who are required by statute to be attorneys at law must necessarily maintain their status as members of the legal profession, and the Supreme Court of Ohio, by virtue of its inherent power with reference to the disciplining of members of such profession, may provide by rule the basis for and the procedure to be followed in the disciplining of such members who hold judicial positions.
>
> "6. The Canons of Judicial Ethics, as adopted by and made a rule of the Supreme Court of Ohio, provide a basis for the disciplining of members of the legal profession who hold judicial positions, and a breach thereof subjects such a member of the legal profession to disciplinary action according to the procedure set out in Rule XXVII of such court."

Respondent contends that since R. C. 2701.12 and Gov. R. VI were adopted subsequent to *Franko*, these constitute the exclusive method for disciplinary action against a member of the legal profession who is a judge for misconduct in office. We reject this contention. R. C. 2701.12 and Gov. R. VI do provide procedure for removal of a judge from office. Gov. R. V, on the other hand, does not pertain to the removal of judges from office, although proceedings under that rule may result in disqualification of a judge [223] because he is required to be a lawyer. See *State, ex rel. Saxbe v. Franko* (1958), 168 Ohio St. 338.

Gov. R. V(4) provides that:

> "* * * all proceedings with regard to mental illness and complaints and grievances involving alleged misconduct by attorneys and counselors at law and

judges; all proceedings for the discipline of such attorneys and counselors at law, persons under suspension for an indefinite period or disbarred from the practice of law, and judges; and all proceedings for reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provisions of this rule. * * *" Gov. R. V(5)(a) defines misconduct as:

"* * * any violation of any provision of the oath of office taken upon admission to the practice of law in this state, or any violation of the Code of Professional Responsibility or the Canons of Judicial Ethics as adopted by the court from time to time, disobedience of these rules or of the terms of an order imposing a suspension for an indefinite period from the practice of law, or the commission or conviction of a crime involving moral turpitude. * * *"

While it might be a more logical procedure, in cases of lawyers who are judges, to first proceed under Gov. R. VI for removal from office, and then proceed under Gov. R. V with respect to disciplinary action as a member of the legal profession, we find no error or prejudice to respondent in proceeding first with proceedings pursuant to Gov. R. V. This is especially true in this case, since the respondent at the outset of the filing of the complaint, requested that the proceedings be pursuant to Gov. R. V (then Rule XVIII of the Rules of Practice). The supplemental complaint alleged that respondent utilized improper methods in attempting to influence the proceedings to be pursuant to Rule XVIII (now Gov. R. V) rather than Rule XXI (now Gov. R. VI). Respondent, in his answer thereto, stated that "respondent admits that through his counsel by invitation he * * * did suggest that all interests were best served in the disposition of this cause if pro-

ceedings were **[224]** governed by Rule XVIII." Respondent cannot now be heard to complain that his "suggestion" was followed. The evidence received by the hearing panel also indicates that this was the desire of the respondent. Accordingly, respondent's motions to dismiss and to quash are overruled.

We now turn to consideration of the findings of the board. The finding of the board that the respondent's personal behavior in his everyday life, while a judge, gave the appearance of impropriety and was not beyond reproach (Count 1) and constituted a violation of Canon 4, is supported by, and required by, the evidence.

The board's finding that respondent violated Canons 13, 25 and 34 in connection with his business association with the Harmony Loan Company is also supported and required by the evidence. Respondent contends that he has not violated Canon 25 because other judges in Ohio also serve on boards of directors of savings and loan associations.

Canon 25 of the Canons of Judicial Ethics, as adopted by the then members of this court on January 27, 1954 (160 Ohio St.), differs from Canon 25 as adopted by the American Bar Association. Canon 25 provides that:

> "A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, [n]or use the power of his office [or the influence of his name] to promote the business interests of others; he should not solicit for

charities, nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties."

The foregoing quoted language, in brackets, is included in Canon 25 as adopted by the American Bar Association but is not included in Canon 25 as adopted by this **[225]** court in 1954. That court, by omitting the language in brackets from American Bar Canon 25, seemingly intended to give judges greater latitude in their business relationships than would be permitted by the American Bar Canon. In view thereof, it would appear that a judge does not necessarily violate Canon 25, as adopted in Ohio, *merely by serving* as a member of the board of directors of a loan company or a savings and loan association, where he in good faith discharges his duties as a director and nothing more is involved.*

If the fact of a judge's membership on the board of directors is used by the corporation to persuade others to patronize it or is used by the corporation to promote its business interests, the judge, by accepting membership on the board of directors, has given ground for "reasonable

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* The additional language explains the conclusion to the contrary in Opinion 254 of the Committee on Professional Ethics and Grievances of the American Bar Association. The Committee on Legal Ethics and Professional Conduct of the Ohio Bar Association apparently did not take cognizance of the difference in language between Canon 25 as adopted for Ohio, and that as adopted by the American Bar Association, in its Opinion No. 19, which was reaffirmed and reported in the October 23, 1972, issue of Ohio Bar (XLV Ohio Bar No. 41, page 1423). *Whether this will continue to be the rule for conduct of judges depends upon the action of this court in its consideration of the new Code of Judicial Conduct adopted by the American Bar Association, Canon 4 of which expressly prohibits a judge from serving as an officer, director, employee or advisor of any business organization.*

suspicion" that the judge is using "the power or prestige of his office" for that purpose. This is especially true if the judge does not regularly attend meetings of the board of directors, but is a member of the board in name only.

Even if under the Ohio Canon 25, respondent could serve as a member of the instant board of directors, he violated Canon 25 when Harmony Loan misused the fact of his membership. When he accepted membership on that board he undertook the affirmative duty to make certain that there would be no misuse made by Harmony of that membership.

[226] Canon 13 provides in part, that a judge "should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor."

Canon 33 provides, in part, that a judge should "in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct."

Count 8 alleges that:

> "On the board of directors of Harmony Loan Company have been Joseph Becker, bailiff for Judge Heitzler in both courts, and Robert Stone, a Cincinnati attorney who is a personal friend of Judge Heitzler, who appears with some frequency before Judge Heitzler, and frequently has lunch in a public restaurant with Judge Heitzler.
>
> "James J. Matthews, president of Harmony Loan Company, was treasurer of Judge Heitzler's campaign in 1968 for the Court of Domestic Relations.

"Ralph Crisci, chief referee in Domestic Relations Court, was at one time assistant vice president and attorney for Harmony Loan Company.

"Sylvan Reisenfield, attorney for Harmony Loan Company, appears in the Domestic Relations Court before Judge Heitzler.

"Harmony Loan Company has from time to time issued brochures which contain the pictures and identifying names of its directors and officers, including Joseph Becker, Robert Stone and James Matthews, and Judge Heitzler.

"Relator says that in knowingly associating with Harmony Loan Company and its officers and directors and in permitting the publicity of his name as a judge in connection with the business of Harmony Loan Company, Judge Heitzler has violated Judicial Canons 13, 25, 33, and 34."

Respondent, as his answer to said count, stated that he "admits the allegations contained in paragraph 8 of said complaint and certificate filed herein, but specially [227] and specifically denies that he violated any Canon of Judicial Ethics." This admission, together with the evidence presented at the hearing, fully justifies a finding of misconduct by respondent in connection with his association with Harmony Loan Company.

Count 9 alleges misconduct by respondent in his handling of numerous cases in which Harmony Loan Company was a party while he was a judge of the Cincinnati Municipal Court. Respondent admitted handling such cases at a time when he was both a director of the company and an investor therein.

Canon 26 provides, in part, that "where he has a personal investment in an enterprise involved in litigation

in the court, he should disqualify himself from acting in such litigation unless the interest is so slight that he does not believe it could affect the impartial performance of his official duties and the parties to such litigation are so informed and do not object."

Canon 29 provides, in part, that "a judge should abstain from performing or taking part in any judicial act in which his personal interests are involved."

Respondent contends that since the evidence indicates that he tried no "contested" case involving the Harmony Loan Company, and since the acts involved occurred during a prior term of office as judge of a different court, that he cannot now be charged with misconduct with regard thereto.

The evidence does not indicate that respondent heard any "contested" cases involving Harmony Loan Company, nor does it indicate that respondent disqualified himself from handling such cases. Respondent granted numerous default judgments and confessed judgments to Harmony Loan Company while a judge of Cincinnati Municipal Court at a time when he had a substantial investment in said company and was a director thereof. Respondent also signed garnishment orders, continuances, dismissals, and ruled upon some motions.

The granting of a default judgment or a confessed [228] judgment necessarily involves a judicial determination of whether the plaintiff is entitled thereto. The granting of a default or confessed judgment to an enterprise in which a judge has a personal investment constitutes acting in litigation involving such enterprise, in violation of Canon 26. Even where the judge's interest is so slight that it could not affect the impartial performance of his official duties, the judge cannot so advise the

adverse parties, nor do they have any opportunity to object, where the judgment is entered by default or confession. Furthermore, in view of the numerous cases involving Harmony Loan Company in which respondent performed judicial acts, there is no possibility that his actions were the result of oversight.

In support of his position, respondent relies upon authority to the effect that a default judgment granted by an interested judge does not render such judgment void or subject to collateral attack in the absence of fraud. See *Ashland Bank & Savings Co. v. Houseman* (1915), 5 Ohio App. 165. However, that has no bearing upon the propriety or ethical considerations of a judge so acting.

Respondent contends further that most of the cases in which he acted were first heard by a referee. However, the remainder of the cases were not so heard. Furthermore, assuming the cases were first heard by a referee and then the entry of judgment was signed by respondent, respondent took no precaution to prevent the appearance of impropriety in connection therewith, which the Canons of Judicial Ethics require of him.

In support of his contention that misconduct during a previous term cannot now be considered, respondent relies upon *State, ex rel. Vogt, v. Donahey* (1923), 108 Ohio St. 440; *McMillen v. Diehl* (1934), 128 Ohio St. 212; and *State, ex rel. Stokes, v. Probate Court* (1970), 22 Ohio St. 2d 120, all of which hold that, under the applicable statutes, an officer cannot be removed from office for misconduct during a previous term of office. However, it is pointed out in *Stokes* that this is not the result where a statute specifically provides for disqualification or removal for misconduct **[229]** during a previous term, citing *In re Coppola* (1951), 155 Ohio St. 329, wherein it is stated, at page 332:

> "* * * the General Assembly has the power to require reasonable qualifications for office and if a statute provides that misfeasance and malfeasance during a previous term shall be a ground for the removal of a public official during his existing term, such a statute must be given effect."

R. C. 2701.12 specifically provides that a violation of the Canons of Judicial Ethics by a judge "since first elected or appointed to judicial office" constitutes cause for removal of such judge from office.

Furthermore, as pointed out above, this is not a removal-from-office proceeding, although it may indirectly have that effect. Rather, this proceeding is a disciplinary action against a member of the legal profession, who is a judge, and will result in disciplinary action against respondent as a member of the legal profession. As stated in the second paragraph of the syllabus of *Mahoning County Bar Assn. v. Franko* (1958), 168 Ohio St. 17:

> "The legal profession of Ohio includes every person who has been admitted to the practice of law in this state, by and under the rules for admittance thereto as adopted by the Supreme Court of Ohio, whose name is maintained on the Roll of Attorneys kept by such court, regardless of the subsequent capacity or status of such person."

There is no doubt that respondent was a member of the legal profession at the time involved, and continues to be, and it is that status which is the subject of this proceeding. Thus, the misconduct alleged occurred while respondent was a member of the legal profession of Ohio, regardless of whether it occurred during his existing, or a previous, term of office as a judge.

The evidence clearly supports the finding of the board that respondent violated the Canons of Judicial Ethics by handling numerous cases in which Harmony Loan Company was a party, at a time when he was a director of, and had a substantial investment in, said company.

[230] As to Count 10, respondent admitted that he hired as a constable a man with a lengthy criminal record, knowing of such record. Canon 12 provides, in part, that "trustees, receivers, masters, referees, guardians and other persons appointed by a judge to aid in the administration of justice should have the strictest probity and impartiality and should be selected with a view solely to their character and fitness. The power of making such appointments should not be exercised by him for personal or partisan advantage." Canon 34 provides, in part, that a judge should "deal with his appointments as a public trust."

Respondent contends that these canons are not applicable to the employee in question because he was a "glorified usher" or "go for," being one who "fetches" the parties and their attorneys when it is time for their appearance. The employee was hired as a constable. Respondent described his duties as "to schedule various cases in before the various referees at the proper time." Respondent testified further with respect to this constable's duties that he "was to stand out in the hall and a list of the various hearings before the referees was furnished him. He would pull the folders and then as the respective attorneys came in with their clients ready to go on a case on preliminary motions and so forth, escort them into the various referee hearing rooms and come out. In the event he could not get cases or one referee was tied up in a rather lengthy case, then he would get another referee and shift cases around." We find that Canon 12 does apply to a constable with such duties

Respondent also attempts to justify employment of this constable with a criminal record, on the grounds of rehabilitation, and testified that the practice followed by Hamilton County offices in the employment of persons with criminal records has been "if the man has paid his debt to society to give him a chance and put him to work." We agree with the board that such rehabilitation should have been attempted by some means other than employment as a constable in Domestic Relations Court. Respondent testified **[231]** further that the employee with the criminal record had assisted him in his "most recent campaign for Domestic Relations Judge, and one or two of the prior campaigns for Municipal Court."

Canon 12 requires that persons employed to aid in the administration of justice should have the strictest probity and should be selected with a view solely to their character and fitness. Obviously, employees with criminal records employed for the purpose of aiding in their rehabilitation have not been "selected with a view solely to their character and fitness." "Probity" means "unimpeachable integrity." Obviously, a person with a lengthy criminal record, including one felony conviction for burglary, is not possessed of the strictest probity. Respondent completely ignored Canon 12 with respect to this employment.

Evidence was received that the employee in question solicited bribes from at least two persons, one of which was allegedly paid. When the person, from whom the bribe not paid was solicited, advised respondent of the solicitation, respondent did not immediately discharge the employee in question, but retained him as an employee until the advent of newspaper publicity concerning the alleged bribe attempt. The only investigation respondent made was to ask the employee in question, and

respondent stated: "I kept him on because I had no evidence whatsoever that he had done anything wrong." This was apparently predicated upon the failure of the person reporting the solicitation for a bribe to produce for respondent a tape recording of the bribe solicitation. Respondent stated that: "* * * when he was suspended, he was first suspended when portions of an excerpt from a so-called tape appeared in the paper and he was linked to that and he was suspended without pay. * * *"

The finding by the board of misconduct by respondent in the hiring and retaining of the employee with a criminal record is fully supported by the evidence.

Respondent contends also that "even if the findings of fact by a board of commissioners are supported by the [232] evidence and confirmed by the Supreme Court of Ohio, the recommendations of the board of commissioners as to the disciplinary action to be administered are too severe for the violations proven under the circumstances."

The facts of this case clearly indicate either that respondent has little or no concept of the ethical behavior required of a judge by the Canons of Judicial Ethics in both his personal and official conduct or that he has such concept, but thinks so little of it that he disregards it completely. As stated in the opinion in *Franko, supra*, at page 36: "Either attitude toward ethics from an attorney at law undeniably would be reprehensible—from an attorney at law who has assumed a judgeship it is inexcusable." Misconduct by a lawyer who is a judge brings even greater discredit upon the legal profession than the same misconduct if performed by a lawyer who has not been entrusted with that high office. The board found that respondent by his conduct has violated Canons 4, 12, 13, 25, 26, 29, 33 and 34 of the Canons of Judicial Ethics.

Having carefully reviewed and considered the entire record, and the objections of the respondent and the briefs submitted, we conclude that the findings of the Board of Commissioners on Grievances and Discipline are fully supported by the evidence, and such findings are therefore affirmed. The objections to such findings and to the recommendations of the board are overruled. The recommendation of the board that respondent be indefinitely suspended from the practice of law is confirmed, and such discipline is hereby imposed.

Judgment accordingly.

O'NEILL, C. J., WHITESIDE, HERBERT, CORRIGAN, STERN, LEACH and BROWN, JJ., concur.

WHITESIDE, J., of the Tenth Appellate District, sitting for SCHNEIDER, J.

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IN THE

Supreme Court of The United States

October Term, 1972

No. 72-1091

GEORGE S. HEITZLER, JR.,
Petitioner,

v.

THE HONORABLES C. WILLIAM O'NEILL,
Chief Justice, et als.,
Respondents.

PETITIONER'S REPLY MEMORANDUM AND SUPPLEMENTAL APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STANLEY E. PREISER
PREISER & WILSON
1012 Kanawha Boulevard, East
Post Office Box 2506
Charleston, West Virginia 25329
Telephone: 304/344-9651
Counsel for Petitioner

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THE CASE IS NOT MOOT NOR WAS THE SIXTH CIRCUIT'S DISMISSAL CORRECT IN ANY RESPECT

Respondents contend at p. 5 of their Brief In Opposition to the Petition for Certiorari that since the Supreme Court of Ohio has completed the disciplinary proceedings against Judge Heitzler that the case is moot. Petitioner submits that because he can apply for reinstatement in the practice of law at the end of two years, and because the Supreme Court of Ohio may deny Petitioner's request for reinstatement, and

because the Rules for the Government of the Bar of Ohio will in any event, remain in full force and effect in the interim subjecting other members of the Ohio Judiciary and Bar to similar constitutional and civil rights deprivations, it is by no means,

> ". . . absolute[ly] clear that the alleged wrongful behavior could not reasonably be expected to recur." *Johnson* v. *New York State Education Department*, ... U. S. ....., 93 S.Ct. ....., 34 L.Ed. 2d 290, 293 (1972) Concurring opinion per Justice Marshall.

See also: *United States* v. *Concentrated Phosphate Export Association*, 393 U. S. 199, 203, 89 S.Ct. 361, 21 L.Ed. 2d 344 (1968); *Indiana Employment Division* v. *Burney*, ... U. S. ..... 93 S.Ct. ....., 35 L.Ed. 2d 62, 65 (1973). The case is therefore not moot. Furthermore, the "collateral consequences"[1] of reinstatement under Gov. R. V alone are sufficient to negate any suggestion of mootness. *Sibron* v. *New York*, 392 U. S. 40, 88 S.Ct. 1889, 20 L.Ed. 2d 917 (1968).

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[1] While Judge Heitzler's suspension is in effect the Board of Commissioners on Grievances and Discipline is empowered to: (1) investigate any complaints made against one subject to an indefinite suspension Gov. R. V (2) (a); (2) generally conduct an investigation and take evidence relating to a petition for reinstatement Gov. R. V (2) (b), and Gov. R. V (25); and (3) investigate and take evidence relating to any alleged contempt of any order issued by the Supreme Court of Ohio Gov. R. V (2) (d). . . .

Judge Heitzler can next petition for reinstatement two years after the date of the entry of the order indefinitely suspending him and if this is denied, another two years must elapse before reinstatement can again be sought, Gov. R. V (21). Petitioner's past record during reinstatement proceedings is open to scrutiny and additional evaluation. Gov. R. V (22). Any unpaid costs must be paid as a prerequisite to any reinstatement effort, Gov. R. V (23), and the Reinstatement inquiry is open to the obvious discretion of whether the petitioner is now possessed with "all of the qualifications, mental, educational, and moral . . . ." that are required. Gov. R. V (24). A new hearing must be held and more testimony taken. Gov. R. V (25), (26). The Supreme Court of Ohio finally rules on the merits of the petition for reinstatement. Gov. R. V (26).

Assuming even *arguendo*, the case could be moot, the proper course would be to remand the case to the Sixth Circuit with directions to remand it to the United States District Court for the Northern District of Ohio to ascertain if the case is in fact, moot, *Johnson* v. *New York State Education Department*, ... U. S. ....., 93 S.Ct. ....., 34 L.Ed. 2d 290, 291 (1972); *Indiana Employment Division* v. *Burney*, ... U. S. ....., 93 S.Ct. ....., 35 L.Ed. 2d 62, 63 (1973); *Dillard* v. *Industrial Commission* ..... U. S. ....., 93 S.Ct. ....., 34 L.Ed. 2d 444 (1972) or in the alternative to remand the case to the District Court and permit Petitioner to amend his complaint.

As to the merits of the district court's jurisdiction, Respondents brief entirely ignores the Sixth Circuits' holding in *Taylor* v. *Kentucky Bar Association*, 424 F. 2d 478 (6th Cir. 1970) and the opinion on remand *granting* to the district court jurisdiction in a federal civil rights case under 42 U. S. C. §1983. As already discussed, *Erdmann* v. *Stevens*, 458, F.2d 1205 (2nd Cir. 1972) certiorari denied 93 S.Ct. 126 (1972) *supports* the jurisdiction of the federal district court. (Petition at pp. 26-27).

PETITIONER'S FIRST AND FOURTEENTH AMENDMENT CLAIMS ARE SUBSTANTIAL

Respondent characterizes Petitioners' First and Fourteenth Amendment claims as "anemic" (Brief pp. 5-6). To the contrary, reference to Respondent's own Appendix, (pp. A-14-15) wherein the Opinion of the Supreme Court of Ohio is set out clearly notes that Petitioner not only alleged that his First and Fourteenth Amendment rights were infringed (Pet. App.

pp. A-17, A-25, 26), but the Supreme Court of Ohio based its very holding on those associations Judge Heitzler claims are protected by the First and Fourteenth Amendments (Resp. App. A-14-15). The ultimate restriction upon Judge Heitzler's conduct as embodied in the Opinion of the Supreme Court of Ohio sweeps almost as broad as the unnecessary restriction on the First and Fourteenth Amendment rights presented in the recent Civil Rights case of *Lynch* v. *Snepp*, 350 F. Supp. 1134, 1139 (W. D., N. C., Char. Div. 1972) wherein the court held that:

> " 'Our federalism' (Younger v. Harris, 401 U. S. 37, 91 S.Ct. 746, 27 L.Ed.2d 699 (1971) provides a dual system of state and federal servants. Comity, a judicial doctrine, contemplates that federal and state courts respect each other's opinions and problems. This minimizes conflicts. It is everyday courtesy. *The United States Constitution, the supreme law of the land, values human freedom more than judicial courtesy, and requires that all state and federal judges respect the Bill of Rights, including rights of free speech and expression. Abstention, comity, and federalism are not valid reasons, on this record, for shirking this court's duty to investigate and protect against the alleged serious threats to constitutional freedom.* The case should be decided on its merits." (Emphasis added.)

The instant case, like *Lynch* should be decided on the merits.

THE SIXTH CIRCUIT ERRED IN DISMISSING PETITONER'S CASE

The Respondent in the instant case in its Brief entirely ignores the recent unanimous pronouncement by this Court in *American Trial Lawyers Association* v. *New Jersey Supreme Court*, ... U. S. ....., 93 S.Ct. ....., 34 L.Ed. 2d 651 (January 15, 1973) concerning postponement and retention of federal jurisdiction in an abstention situation *rather than a dismissal.* "The proper course is for the District Court to *retain* jurisdiction pending the proceedings in the state courts." (Emphasis added.) 34 L.Ed. 2d 651, 653. The Court of Appeals thus erred in ordering the District Court to dismiss the case.

Petitioner again submits that the venue was in fact proper under 28 U.S.C. §1392 (a) and the Court is respectfully referred to the Petition (pp. 30-32) for the authorities and arguments presented there.

THE SIXTH CIRCUIT FILED THEIR *PER CURIAM* OPINION ON NOVEMBER 10, 1972, WITHOUT NOTICE OR ORAL ARGUMENT, OR BRIEF DIRECTED TO THE PROPRIETY OR LACK OF IT CONCERNING THE PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION.

Respondents, in the Counterstatement of Case at p. 3 of their Brief in Opposition state that the Sixth Circuit's Order ". . . was entered only after it had had an opportunity to review Petitioner's extensive brief." Petitioner again submits that the Sixth Circuit filed their *Per Curiam* opinion of November 10, 1972 without notice, without oral argument, and without a brief

directed to the propriety or lack of it concerning the Petition for Writ of Mandamus and/or Prohibition.

As the record will readily verify, Petitioner filed in the Sixth Circuit a Motion and Brief in support thereof to dissolve, vacate, dismiss or modify the *Stay Order* previously entered by the Sixth Circuit. Petitioners Motion was made *primarily* to secure the stay, not with a view toward the propriety or lack of it concerning the Petition for Writ of Mandamus and/or Prohibition itself although the brief did summarily state that the Anti-Injunction Act was not applicable. (See Petition pp. 10, 11).

CONCLUSION

For the reasons embodied in the Petition and those set out in this Reply Memorandum, the Writ of Certiorari should be granted.

Dated: March 23, 1973.

Respectfully submitted,

Stanley E. Preiser

STANLEY E. PREISER
PREISER & WILSON
1012 Kanawha Boulevard, East
Post Office Box 2506
Charleston, West Virginia 25329
Telephone: 304/344-9651
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I served three true and correct copies of the foregoing Reply Memorandum and Supplemental Appendix upon Victor E. DeMarco, Esquire, Jones, Day, Cockley & Reavis, 1750 Union Commerce Building, Cleveland, Ohio, 44115, Attorneys for Respondent, and upon the Honorable Frank J. Battisti, Chief Judge of the United States District Court for the Northern District of Ohio, at Cleveland, United States Court House, Cleveland, Ohio 44114, and upon the Solicitor General, Department of Justice, Washington, D. C. 20530, by depositing same in the United States mail, postage prepaid, air mail, this 23 day of March, 1973.

Stanley E. Preiser

STANLEY E. PREISER
Of Counsel for Petitioner

SUPPLEMENTAL APPENDIX

Page

1. Opinion, *Burks* v. *Perk*, United States Court of Appeals for the Sixth Circuit, F.2d (November 17, 1972) ... SA-2 to SA-6

2. Opinion, *In re*: *Petition for Reinstatement of John Ruffalo, Jr.* On Certified Report by the Board of Commissioners on Grievances and Discipline ... SA-6

This Supplemental Appendix contains the opinions in the *Burks* v. *Perk* decision and the opinion in the reinstatement petition of John Ruffalo. The *Burks* v. *Perk* decision is cited in Judge Heitzler's Petition for Writ of Certiorari at pp. . . . 24, 29 at n. 1. The *Ruffalo* decision denying John Ruffalo reinstatement to practice is cited in Judge Heitzler's Petition for Writ of Certiorari at p. 24.

These opinions were unavailable to Petitioner's counsel as of February 8, 1973 and are now respectfully submitted for their consideration by this Honorable Court.

No. 72-1368

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WALTER A. BURKS, JR., ET AL.,
Plaintiffs-Appellees,

v.

RALPH PERK, Mayor of the City of Cleveland, Ohio,
Defendant-Appellant.

APPEAL from United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed November 17, 1972.

Before PHILLIPS, Chief Judge, WEICK, Circuit Judge, and BRATCHER*, District Judge.

PER CURIAM. Ralph Perk, Mayor of the City of Cleveland, Ohio, has appealed from an order of the District Court restraining and enjoining him from conducting a hearing on written charges of neglect of duty and malfeasance in office, which charges were made against five members of the Civil Service Commission of the City.

The written charges specified the acts of neglect of duty and malfeasance in office, gave to each Commis-

* The Honorable Rhodes Bratcher, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

sioner more than ten days' notice of the time and place of a public hearing thereon before the Mayor, and stated that each Commissioner would have opportunity to be heard in person and by counsel and to present evidence in his defense.

Instead of resisting the charges at a hearing before the Mayor, who had the power of appointment as well as removal for cause, under the City Charter, the Commissioners joined in filing in the District Court a complaint against the Mayor seeking to enjoin even the hearing, and alleging that there is a conflict between a state statute and the City Charter; that no judicial review of the Mayor's decision is available in the state; that the Mayor is biased; that the charges are not sufficiently specific; and that the procedure of the City Charter violates the due process clause of the Fourteenth Amendment.

Jurisdiction of the Court was founded on 28 U.S.C. §§ 1331, 1343 and 1983.

On plaintiffs' motion for a temporary restraining order the District Court heard arguments of counsel but took no evidence. Following the hearing the Court filed a written memorandum and order in which it did not determine any issues of state law, but suggested that plaintiffs file an action for declaratory judgment in the state court, (which they later did), and issued a preliminary injunction restraining the Mayor from conducting any hearing while the state issues were being determined in the state court. The District Court reserved for itself the determination of the federal questions raised. The District Court has thus bifurcated the case, with one part pending in the Com-

mon Pleas Court, and another part in the District Court, and has prevented the Mayor from conducting any hearing on the charges.

In our opinion the Mayor had full power and authority to hear and determine the charges against the Commissioners under Section 124 of the Charter of the City of Cleveland, which provides as follows:

> "A member of the civil service commission may be removed by the mayor for neglect of duty, incapacity, incompetency, or malfeasance in office, but only after opportunity has been given for a public hearing before the mayor, to be held at least ten days after written charges have been made and notice thereof been given to the accused member. Such member shall be heard in person or by counsel; and such removal shall be final."

Contrary to the claim of appellees, a judicial review of a final decision of the Mayor is expressly provided by Section 2506.01, Ohio Revised Code (Supp.), as follows:

> "Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located, as provided in section 2505.01 to 2505.45, inclusive of the Revised Code, and as such procedure is modified by section 2506.01 to 2506.04, inclusive of the Revised Code."

By virtue of this statute the Commissioners could have obtained a judicial review of any final decision

of the Mayor, in the Common Pleas Court of Cuyahoga County.

The Common Pleas Court in Ohio, unlike the United States District Court, which is a court of limited jurisdiction, is a court of general jurisdiction. If it became necessary to restrain enforcement of an adverse decision of the Mayor pending review, the Common Pleas Court had full power and authority to enjoin such enforcement. The Commissioners thus had an adequate remedy under state law. They ought not be permitted to frustrate state procedures by resorting to Federal Courts in the first instance. No irreparable injury to plaintiffs has been alleged or shown.

The Commissioners do not have a constitutional right to public employment. *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1961); *Orr* v. *Trinter*, 444 F.2d 128 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972).

Public office is not property within the meaning of the Fourteenth Amendment. *Taylor & Marshall* v. *Beckham*, 178 U.S. 548 (1900).

In *Wilson* v. *North Carolina*, 169 U.S. 586 (1898), the Court held that the removal of a railroad commissioner by the Governor of a state which by statute had vested in him the power of appointment and removal, did not deprive the commissioner of his property without due process of law.

But even if the Commissioners in the present case had a property interest in their offices, the provisions for notice and hearing on removal charges provided in

the City Charter, and the right of review by the state courts, would seem to comply with due process requirements. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

Federal Courts ought not intrude in controversies between state political subdivisions and their officers, over the title to a state office or the rights of persons appointed to such office. We ought not strain unnecessarily the relationship between federal-state judicial systems.

The judgment of the District Court is reversed; the injunction is dissolved; and the cause is remanded to the District Court with instructions to dismiss the complaint.

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45 Ohio Bar 1654

DISCIPLINARY DOCKET DECISION: DD 57. In re: Petition for Reinstatement of John Ruffalo, Jr. (December 4, 1972)

ON CERTIFIED REPORT BY THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE.

On Petition for Reinstatement. Report confirmed and reinstatement denied.

FILE COPY

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

October Term, 1972

No. 72-1091

GEORGE S. HEITZLER, JR.,
Petitioner,

v.

THE HONORABLES C. WILLIAM O'NEILL,
Chief Justice, et als.,
Respondents.

SUPPLEMENTAL MEMORANDUM

STANLEY E. PREISER
PREISER & WILSON
1012 Kanawha Boulevard, East
Post Office Box 2506
Charleston, West Virginia 25329
Telephone: 304/344-9651
Counsel for Petitioner

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Chief Justice, et als.,
Respondents.

WITHDRAWAL OF RELIANCE UPON *LYNCH v. SNEPP*, 350 F. SUPP. 1134 (W. D., N. C. CHAR. DIV. 1972)

In Petitioner's Reply Memorandum and Supplemental Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the 6th Circuit, filed in your office March 24, 1973, reliance was placed upon *Lynch* v. *Snepp*, 350 F. Supp. 1134 (W. D., N. C., Char. Div. 1972).

Receipt in today's mail of Volume 472, F. 2d No. 2, April 2, 1973, pp. 513-1072, discloses that *Lynch* v. *Snepp*, 472 F. 2d 769 (4th Cir. 1973) has been reversed.

Therefore, that sentence of the Reply Memorandum in which reliance upon *Lynch* v. *Snepp* is placed is respectfully withdrawn.

Respectfully submitted:

Stanley E. Preiser
STANLEY E. PREISER
PREISER & WILSON
1012 Kanawha Boulevard, East
Post Office Box 2506
Charleston, West Virginia 25329
Telephone: 304/344-9651
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I served three true and correct copies of the foregoing Supplemental Memorandum upon Victor E. DeMarco, Esquire, Jones, Day, Cockley & Reavis, 1750 Union Commerce Building, Cleveland, Ohio 44115, Attorneys for Respondent, and upon the Honorable Frank J. Battisti, Chief Judge of the United States District Court for the Northern District of Ohio, at Cleveland, United States Court House, Cleveland, Ohio 44114, and upon the Solicitor General, Department of Justice, Washington, D. C. 20530, by depositing same in the United States mail, postage prepaid, air mail, this 14th day of April, 1973.

Stanley E. Preiser
STANLEY E. PREISER
Of Counsel for Petitioner